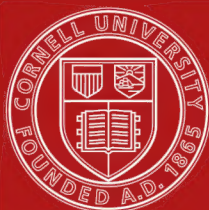


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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF CHANCERY

OF THE

STATE OF NEW YORK.

BY

OLIVER L. BARBOUR,

COUNSELLOR AT LAW.

SECOND EDITION,

ANNOTATED, BY

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**CHANCELLOR, VICE CHANCELLORS,
AND
ASSISTANT VICE CHANCELLORS,**

DURING THE TIME OF THE FOLLOWING REPORTS.

~~~~~

**Chancellor.  
REUBEN H. WALWORTH.**

**Vice Chancellors and Assistant Vice Chancellors.**

**FIRST CIRCUIT,  
LEWIS H. SANDFORD, V. C.  
ANTH'Y L. ROBERTSON, A. V. C.**

**SECOND CIRCUIT,  
SEWARD BARCULO.**

**THIRD CIRCUIT,  
AMASA J. PARKER.**

**FOURTH CIRCUIT,  
JOHN WILLARD.**

**FIFTH CIRCUIT,  
PHILO GRIDLEY.**

**SIXTH CIRCUIT,  
HIRAM GRAY.**

**SEVENTH CIRCUIT,  
BOWEN WHITING.**

**EIGHTH CIRCUIT,  
FREDERICK WHITTLESSEY.**





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## CASES IN CHANCERY

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### MALLORY and others *vs.* VANDERHEYDEN.

[Reversed, 1 N. Y. 452.]

**The liability of a husband, for the debt of his wife, and to be sued jointly with her in an action at law for the recovery of the same, terminates upon his being discharged under the bankrupt act. And no suit at law can be maintained against the wife during the life of the husband, without joining her husband with her in the same suit. The remedy at law is therefore suspended as to the wife, or her estate, during the coverture.**

**But there is nothing in the English bankrupt act, or in our act of 1841, by which the discharge of the husband is made a discharge of his wife, or a discharge of her separate estate, or of her reversionary interest in her real estate after the death of her husband, from liability for debts contracted by the wife before her marriage.**

**Where the wife survives her husband, who has been discharged under the bankrupt act, actions at law may be maintained against her for her debts, contracted before her marriage; in the same manner as if her husband had not been discharged from his liability.**

**Upon the death of the husband, debts contracted by the wife before the marriage, and which have not been recovered of her and her husband during her coverture, survive against her; and the estate of her husband is not liable therefor.**

**Where the husband survives the wife, although he is no longer liable for debts contracted by her while sole, however much he may have received by the marriage, her separate estate, in the hands of her personal representatives, is liable for those debts.**

**A creditor, whose remedy at law, for the collection of a debt contracted by a married woman previous to her marriage, is suspended during the lifetime of the husband, by his discharge under the bankrupt act, may file a bill in chancery, against the husband and wife, to reach stocks standing in her name, for her sole and separate use, and other property held in the same manner, and which belonged to her before her coverture; and may have such separate property applied to the payment of his debt.**

**Where rights exist, and the remedy at law is inadequate to meet the justice and equity of the case, it is a part of the ordinary jurisdiction of the court of chancery to provide for such a case.**

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Mallory v. Vanderheyden.

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THIS was an appeal by the defendants from a decretal order of the vice chancellor of the third circuit, overruling the demurrer to the bill of the complainants. The object of the bill was to reach certain stocks standing in the name of Mrs. Vanderheyden, for her sole and separate use, and other property held in the same manner, and which belonged to her before coverture; and to have it applied to the payment of a debt which she owed to the complainants at the time of her marriage; her husband having been discharged from his debts under the bankrupt act.

The following opinion was delivered by the vice chancellor:

PARKER, V. C. The first inquiry in this case is, whether the facts stated in the bill of complaint and admitted by the demurrer, entitle the complainants to the relief asked for, independent of the question arising from the husband's discharge in bankruptcy, which I shall afterwards consider. It has long been a well settled rule, in equity, that a feme covert, in regard to her separate property, is considered a feme sole, and may by her contracts bind such separate estate, though she is incapable, even in equity, of binding herself personally. (*Dowling v. Maguire*, *Lloyd & Goold's Rep. temp. Plunket*, 19. *Cater v. Eveleigh*, 4 *Dessau. Rep.* 19. *Montgomery v. Eveleigh*, 1 *McCord's Ch. Rep.* 267. 17 *John. Rep.* 548. 7 *Paige*, 14, 112.) But there has been much difference of opinion as to the character of the contract necessary to bind her separate property. One of the leading cases on this subject was that of *Hulme v. Tenant*, (1 *Brown's Ch. Rep.* 15,) where it was held by Lord Thurlow that a bond of a feme covert, executed jointly with her husband, should bind her separate estate. The correctness of this decision was several times called in question by Lord Eldon, and particularly in *Nantes v. Currock*, (9 *Ves.* 181,) and in *Jones v. Harris*, (*Id.* 497;) yet it seems fully to be sustained by the later decisions. In *Bullpin v. Clark*, (17 *Ves.* 365,) a married woman had borrowed money, and having promised verbally to repay it out of her separate property, she gave her promissory note. The court of chancery decreed pay-



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Mallory v. Vanderheyden.

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ment of the debt out of the rents and profits of estates settled to her separate use. In the still later case of *Murray v. Barlee*, (4 *Sim. Rep.* 82,) the vice chancellor, Sir Launcelot Shadwell, decreed payment of a debt out of the separate property of a feme covert, where no bond or note had been given, but when she had promised by letter to pay the debt; or had said what was considered equivalent to a promise. The same case came before Lord Chancellor Brougham on appeal, and was affirmed by him, in 1834. (3 *Mylne & Keene*, 209.) The opinion of Chancellor Brougham goes the full length of saying that the wife's separate property is bound, whether the promise is in writing or verbal. It is conceded in all these cases that the bond, note, or promise is void and inoperative at law; but it is held, that in equity it shall be considered an appointment of her sole and separate property.

The power of appointment is incident to the right to enjoy her separate property. There must appear to be an intention to change her separate estate; otherwise the debt will not affect it. (2 *Story's Eq.* 628.) All these decisions proceed upon the ground, that having contracted the debt during coverture, the presumption is that she intended to charge her separate estate. It is said by Judge Story, (2 *Story's Eq.* 773,) that the decisions have not yet gone the full length of holding that all her general pecuniary engagements shall be paid out of her separate property, without some particular promise or engagement, operating as an appointment; but he admits that the tendency of the more recent decisions is certainly in that direction. (2 *Story's Eq.* 628. 18 *Ves.* 255.) But it seems to me the court for the correction of errors in this state, in *Gardner v. Gardner*, (22 *Wend.* 528,) have gone that length. Mr. Justice Cowen, in giving the leading opinion in that case, says, I think the better opinion is, that separate debts, contracted by her expressly on her own account, shall in all cases be considered an appointment, or appropriation for the benefit of the creditor, as to so much of her separate estate as is sufficient to pay the debt, if she be not disabled to charge it by the terms of the donation. And I think that such should be the rule,

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and that nothing short of it will fully carry out the acknowledged doctrine, that in regard to her separate property a feme covert is to be considered a feme sole; for the property of a feme sole would be liable to all her general creditors. In addition to the case I have referred to, the courts of this state, in other decisions, have recognized the rule as fully as it has been laid down by the English court of chancery. (7 *Paige*, 14. 3 *John. C. R.* 77. 17 *John. Rep.* 548, 580. *Gardner v. Gardner*, 7 *Paige*, 112. *Shirly v. Shirly*, 9 *Id.* 363.)

In this case, however, it is unnecessary to look for a broader rule; for the intention to charge her separate property appears clearly from the facts set forth. From the admitted allegations in the bill, it is shown that the goods were sold, and the money advanced to the wife, while sole, upon the credit of her individual property; and that it was agreed by her that the debt should be paid by applying it on notes which the complainants owed the estate of her former husband. This was equivalent to a direct and express agreement to pay out of her individual property, and was repeated and assented to at different times, after the marriage, by both defendants; who continued to evince a desire to have such an arrangement made till February, 1843. But it is urged by the defendants' counsel that the debt not having been contracted during coverture, the presumption that she intended to appropriate her sole and separate property does not apply. I think this objection not available; because whatever the presumption might be, this case does not rest on presumption. The intention to pay out of her separate property is made to appear affirmatively, both before and after marriage, by the agreement to which I have already adverted. Nothing on that subject is left to inference or presumption. The case of *Briscoe v. Kennedy*, decided by the master of the rolls and reported in the note to *Hulme v. Tenant*, (1 *Brown's Ch. Rep.* 17,) is in point. There the debt of the wife accrued before coverture; and after marriage the wife conveyed her property for her separate use; upon a bill filed by the creditor against the husband and wife, and after proceeding to outlawry against the

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husband, the court decreed payment of the debt out of the separate estate of the wife.

The next question to be considered is, whether the demand of the complainants was extinguished by the discharge in bankruptcy of the husband. The only adjudged case bearing on this point is that of *Miles v. Williams*, (1 *Peere Wms.* 257.) That was a case in the king's bench. Debt was brought against baron and feme on a bond entered into by the feme *lum sola*. The defendants pleaded the discharge of the husband in bankruptcy, to which the plaintiff demurred. After several arguments it was held that the discharge was a bar to the action; although judgment was given for the plaintiff on the demurrer, upon the ground that the plea did not conclude to the contrary. The correctness of this decision, in holding a discharge a bar to an action at law against the husband and his wife, has never been doubted. In the case now before me, previously to filing the bill, a suit at law was brought by the complainants against Vanderheyden and wife, to which they pleaded the discharge of the husband; when the complainants, acquiescing in the settled rule at law, discontinued their suit. In *Miles v. Williams*, Ch. J. Parker remarked, that as to the wife the bankrupt's certificate would be a discharge, at least a temporary one, viz. during the husband's life; but though it was not necessary to give an opinion upon that point, he thought it would amount to a perfect release, and that the wife would be discharged forever. This intimation is merely a dictum of the chief justice, the question being in no way involved in the case then before the court. And unless on examination it appears to be founded in principle, it cannot be regarded as authority. Let us see whether it is not in conflict with the well settled rules controlling the rights which grow out of the relations of husband and wife. The husband is liable for the debts of the wife if contracted during coverture. When the coverture is at an end his liability ceases. In case of her death, he is no longer liable; and in case of his death, the debts survive against the wife, and may be collected of her separate property, if she has any. And although she may have brought

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to her husband thousands of dollars in possession, and may have received nothing from her husband's estate at his death, and may have no separate property, still the debt survives against her on the death of the husband, and she is personally liable. The estate of the husband would not in such case be liable. His liability does not depend upon the amount he receives with his wife. The rule of law that makes him liable during coverture for her debts, contracted *dum sola*, is in no way connected with that which entitles him to his wife's property at marriage. Each is a distinct and independent principle of law. By the discharge in bankruptcy the debt is released so far as the bankrupt is concerned; that is, his liability to be sued at law, and to be compelled to pay the debt during coverture is discharged. All his liability is forever cancelled. The right to collect from his property no longer exists. The debt is fully discharged and extinguished as to him; as much so as if he had never become liable by his marriage. It can have no greater effect, for it was not his debt. The credit was not given to him; it was given to the wife *dum sola*. The creditors might have refused to give credit to him; and no act of his or hers could bind the complainants so as to transfer the indebtedness from her to him. By his marriage he did not become the principal debtor. He only assumed a contingent liability, which might be enforced or might not; and until the debt was paid it remained her debt. Reeve, in his treatise on domestic relations, says, the debt of a feme sole is not on her marriage considered as transferred to her husband. If it was, he, or his executor, would be liable after the coverture was at an end. In that case it would not, on his death, survive against the wife; neither would there be any propriety in joining the wife with the husband in a suit to collect the debt of the wife; which, however, must be done. (*Reeve's Dom. Rel.* 68.) Nor does it affect this question that the property Vanderheyden received by his wife went to his assignee, or that his assignee was entitled to collect debts due to her while sole; for the reason I have before mentioned, that his liability in no respect depended on the property he received or was entitled to

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by virtue of his marriage. If he had died before his discharge, the same property which went to his assignee would have gone to his personal representatives; but the complainants would have had no claim on his estate: much less did her indebtedness depend on the property he received. And the question here is, whether her liability, or the liability of her separate property, which she had at the time of her marriage, is extinguished. His right to receive from the executors of Bradt's estate the property belonging to her, had passed to his assignee in bankruptcy; and if the assignee filed a bill to reduce it to possession, he could be compelled to make a suitable provision for the wife and her infant children. (*Van Epps v. Van Deusen*, 4 *Paige*, 64. *Pierce v. Thomley*, 2 *Sim. Rep.* 167. *Honner v. Morton*, 3 *Russ.* 65, 90. *Smith v. Kane*, 2 *Paige*, 303.) The wife and children could therefore be provided for, independent of the stocks conveyed to her sole and separate use.

The reason urged, that the creditors had the right to prove their debt and receive their dividend in bankruptcy, adds nothing to the weight of the defendant's argument. As well might it be urged that in other cases, because the creditors had the right to collect from the husband, they would be compelled to do so, and need not wait to claim it of the wife alone after the death of the husband. In both cases it is optional with the creditor whether he will avail himself of the remedy against the husband, or his assignee; but in neither case, I apprehend, is the original indebtedness cancelled by a neglect to do so. His death would have cancelled his liability and that of his estate; and I think his discharge could have had no greater effect. The doctrine of the dictum of Chief Justice Parker is reiterated in *Reeve's Domestic Relations*, on the authority of that decision; but it is not examined by the author, and acquires no additional weight by this circumstance. In effect it is more like a quotation than an endorsement.

Again; the doctrine contended for by the defendant is not only at war with well settled rules, but it would be exceedingly unjust and inequitable in practice. It would enable the hus

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band to settle upon his wife, for her sole use, such of the property formerly belonging to her as he possessed, and then by his own act extinguish her debts by merely procuring a discharge in bankruptcy; thus cancelling demands without payment and without the consent of the creditor. It is provided by the revised statutes that where the wife dies, leaving property, the husband is solely entitled to administration, and is entitled to the surplus after paying her debts; (2 R. S. 75, §§ 29, 30, 1st ed. ;) and such was the rule at common law. In this case, therefore, on the death of Mrs. Vanderheyden, if the husband survived, he would be entitled to her separate property, and without having first paid her debts, if these debts are extinguished by his discharge. The law cannot be chargeable with such injustice.

On the whole, I cannot believe that the discharge of Vanderheyden cancelled the debt. The claim still existed; and Mrs. Vanderheyden might be sued at law after the death of her husband. Or a proceeding in equity might sooner be instituted, against her, to reach her separate estate. Any other view of the case would countenance an act which would operate as a gross fraud upon the creditor. Even in the case of *Miles v. Williams*, the chief justice remarked that a case might possibly be put where a woman, being in debt, might make over all her effects in trust, and then marry a bankrupt; and by that, discharge all her debts, and yet preserve her estate. But that would be a fraudulent conveyance as against creditors; *quoad* so much of the estate as would satisfy their debts, and for that they might have a remedy. Even in that view of the case, these complainants would be entitled to the relief they ask for, viz. satisfaction of their debt out of her separate property. For they could not be compelled to resort to their dividend in bankruptcy, when the property which ought to pay the debt has been conveyed to her for her sole and separate use, and did not pass to the assignee in bankruptcy.

*H. Z. Hayner*, for the appellants. The complainants did not, while Mrs. Vanderheyden was a feme sole, in any way acquire



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lien that could be enforced at law or in equity. She gave them no mortgage; they recovered no judgment against her; and no arrangement was ever made that could have been enforced at law or in equity while she was feme sole. Her becoming a feme covert, therefore, did not increase her liability.

After the defendant's intermarriage, there was nothing said or done by which Mrs. Vanderheyden charged, or intended to charge, the property held for her sole and separate use, with the payment of the complainants' demand. The property which was spoken of as being in Bigelow's hands, was not her separate property at that time. It cannot be inferred that she intended to appropriate the property held for her separate use to the payment of the complainants' debt. All her property which was not settled to her separate use, became her husband's by the marriage; and by his bankruptcy his assignee has become entitled to it for the use of the creditors. This is so, whether her property has or has not been reduced to possession by the husband. And the legacies not bequeathed to her sole and separate use take the same direction. So also as to her real estate. (*Van Deusen v. Van Deusen*, 6 Paige, 366. *Van Epps v. Van Deusen*, 4 Id. 64, 74. *Pierce v. Thomley*, 2 Sim. Rep. 167. *Honner v. Morton*, 3 Russ. 65, 90. *Smith v. Kane*, 2 Paige, 303. *Fitzer v. Fitzer*, 2 Atk. 515. *Miles v. Williams*, 10 Mod. 244. 2 Kent's Com. 139.) The discharge in bankruptcy, of Vanderheyden, of itself discharges and protects his wife from this debt of the complainants during her coverture, if not forever. The debt can be proved against Vanderheyden under proceedings in bankruptcy. And it was upon that ground that the complainants abandoned their suit in the supreme court.

That there must be some appropriation of the specific property, held for the separate use of the wife, by way of appointment in equity, or some act must be shown from which such an intention on her part may be inferred; otherwise this court will not hold such property liable for the complainants' demand. The wife's intention to make her separate property liable must

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be expressed, or be clearly inferrible from the transaction. (2 *Story's Eq. Jur.* 628.) And the fact that the debt has been contracted during coverture—either as principal for herself, or as surety for her husband, or jointly with him—seems ordinarily to be sufficient to charge her separate property. (*Field v. Sowle*, 4 *Russ.* 112. *Aguilar v. Aguilar*, 5 *Mad.* 418. *Ryland v. Smith*, 1 *Mylne & Craig*, 53. *Lillia v. Airey*, 1 *Ves.* 277, 8. *Hulme v. Tenant*, 1 *Bro. Ch. Rep.* 16. *S. C.* 2 *Dickens*, 560. *Heally v. Thomas*, 15 *Ves.* 596. *Bullpin v. Clark*, 17 *Id.* 365. *Stuart v. Kirkwall*, 3 *Mad.* 387. *Gealty v. Noble*, *Id.* 94.) At first the courts seem to have supposed that nothing could affect it but some real charge, as a mortgage, or some instrument, &c. (2 *Story's Eq.* 629. *Roper, H. & W. ch.* 21, § 3, p. 243. *Sperling v. Rochfort*, 8 *Ves.* 175, n. 178. *Jones v. Harris*, 9 *Id.* 497, 8. *Nantes v. Corrock*, *Id.* 182. *Nevins v. Langdon*, 8 *Id.* 174, n. 1, 2, 3. *Whistler v. Newman*, 4 *Ves.* 129. *Francis v. Wigzell*, 1 *Mad. Rep.* 258.) Afterwards the wife's intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. (*Murray v. Barlee*, 3 *Myl. & K. Rep.* 209. *S. C.* 4 *Sim. Rep.* 82. 2 *Story's Eq.* 628, n. 1, 629.) The principle of holding a general security, executed by a married woman, purporting to create only a personal demand, and not referring to her separate property, a charge upon such separate property is a strong case of constructive implication. And Judge Story says the courts have not gone thus far. (2 *Story's Eq.* § 1397, n. 5, § 1400, n. 1. 2 *Roper, H. & W.* 243 *Anon.* 18 *Ves. R.* 258.)

The whole doctrine of appointment is founded on the legal disability of the feme covert, and is therefore only applicable to a debt contracted during coverture. And there is no allegation in the bill that Mrs. Vanderheyden, by any promise, ever intended to charge her sole and separate property with this debt. (See *Francis v. Wigzell*, 1 *Mad. R.* 258.)

*G. Stow*, same side. The agreement of Mrs. Vanderheyden *dum sola* created no charge upon her property; still less a spe

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ific lien. By her marriage her property became the property of her husband ; and she lost all power over it. The notes in the hands of the executor constituted the fund out of which the defendants, after their intermarriage, agreed to pay the complainants' debt. That fund belonged to Vanderheyden in virtue of his marriage ; his wife having no right in it, or power to dispose of it.

The separate property of a feme covert is liable in equity only because she contracted, or is supposed to contract, in reference to that separate property. In the present case, Mrs. Vanderheyden, after her marriage, made no agreement in reference to, or for the purpose of, charging her separate property, but merely the property of Vanderheyden ; and therefore, according to the principle of all the cases, her separate property is not liable. Nor does it appear that she had any separate property when the post-nuptial agreement, that the complainants' claim should be set off against the notes in the executors' hands, was made. If she had no separate property, then the agreement could not of course charge it. If she had, and if that fact is necessary to be established by the complainants, the bill is demurrable, for having omitted that allegation. The bill is also defective in not alleging that, by the post-nuptial arrangement, Mrs. Vanderheyden agreed to bind her separate estate, or that she intended to do so. In *Francis v. Wigzell*, (1 *Mad. R.* 258,) this was decided to be necessary. If it is necessary to allege such a post-nuptial arrangement and intention, then Mrs. Vanderheyden's separate estate in this case is not liable ; because by an arrangement that the complainants' demand should be paid out of a fund belonging legally to the husband, and which passed to the assignee in bankruptcy, she manifested no intention to charge her sole and separate estate. Even if the fund in the hands of the executor could be reached at all, under any circumstances, it cannot under the present bill—since neither the executor nor the assignee in bankruptcy is made a party—and for that reason also the demurrer is well taken.

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*D. Buel*, for the respondents. It is the well settled doctrine of the court, that a feme covert in regard to her separate property is considered a feme sole, and her separate estate is chargeable with her debts, to the same extent that the estate of a feme sole would be chargeable by the principles of the common law; in other words, her separate estate is liable for the payment of all her equitable debts. (*Prater's Law of Hus. and Wife*, 109. 2 *Story's Eq.* §§ 1399, 1400. *Hulme v. Tenant*, 1 *Bro. C. C.* 16, 21, note. *Lillia v. Airey*, 1 *Ves. jun.* 277. *Bullpin v. Clark*, 17 *Ves.* 365. *Jacques v. Methodist Church*, 17 *John.* 548. *North Am. Coal Co. v. Dyett*, 7 *Paige*, 9; 20 *Wend.* 570, *S. C.* *Gardner v. Gardner*, 7 *Paige*, 112; 22 *Wend.* 526, *S. C.*) It is not necessary that she should sign any writing, or make any express appointment, to charge her separate property. (*Murray v. Barlee*, 4 *Sim.* 82; *S. C. on appeal*, 3 *Myl. & Keene*, 209.) The doctrine now established is that her separate debts, contracted expressly on her own account, shall in all cases be considered an appointment, or appropriation for the benefit of the creditor, as to so much of her separate property as is sufficient to pay the debt; unless she is specially restrained as to the mode of charging such property by the instrument by which she acquired the same. (*Hulme v. Tenant*, 1 *Bro. C. C.* 15. *Gardner v. Gardner*, 22 *Wend.* 526, 528; 7 *Paige*, 112, *S. C.*)

The facts stated in the bill, and admitted by the demurrer, show that the debt to the complainants was contracted on the credit of property which the wife of Vanderheyden, then a feme sole, held in her own right; and which she has ever since held, and now holds, to her separate use. And equity requires that this property should be applied to pay the debt. The fact that the debt was contracted by her *dum sola*, and that she then held in her own right, as a feme sole, the property which by the consent and contrivance of her present husband has been transferred to her separate use, so far from lessening, gives strength to the equity to have that property applied to pay the complainant's debt. (*Briscoe v. Kennedy*, 1 *Bro. C. C.* 18, note.) The transfer of the property, upon the credit of which

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the debt was contracted, especially as the transfer was made on the eve of Vanderheyden's bankruptcy, will be a gross fraud upon the complainants if it cannot be appropriated to pay their debt. (*Miles v. Williams*, 1 P. Wms. 258.) Some early cases carried the doctrine still farther and subjected not only the separate property but other property to pay debts of a feme covert contracted *dum sola*. (*Freeman v. Goodham*, 1 Cas. in Ch. 295. *Bull v. Smith*, 2 *Freeman's Rep.* 231.)

The effect of the bankrupt discharge of Vanderheyden was to suspend the legal remedy by suit against husband and wife, not to discharge her debt. Nor can it affect the remedy in equity, by a proceeding *in rem* to subject her separate property to the payment of the debt. It is well settled that upon the death of the husband, his wife surviving him, she would be subject to an action at law for a debt contracted by her *dum sola*. (*Clancey's Tr.* 13. *Reeve's Dom. Rel.* 68. 2 *Kent's Com.* 123, 1st ed. *Woodman v. Chapman*, 1 *Camp. Rep.* 189, and notes.) So if she should die and the husband should administer, her separate property would be subjected to the payment of her debts contracted before marriage; or if she left debts which the husband had not collected during coverture, they would be subject to her debts. (*Reeve's Dom. Rel.* 13. *Clancey*, 16. 2 *R. S.* 175, §§ 29, 30. *Id.* 98, § 79.) The suggestion of Ch. J. Parker in *Miles v. Williams*, (1 P. Wms. 258,) that the debt of the wife would be discharged by the husband's bankruptcy, is a mere *obiter dictum* and is clearly erroneous. (2 *Kent's Com.* 123, 1st ed.) The wife's debts contracted *dum sola* do not become the husband's debts; for if they did his executors would be chargeable, where he dies before his wife; which clearly they are not. (*Reeve's Dom. Rel.* 68, 69.)

THE CHANCELLOR. Previous to the marriage of Mrs. Vanderheyden, all her estate was liable for the payment of this debt, whether it was held as separate estate or otherwise. And the question is whether it is equitable to permit her to hold that estate, in the events which have occurred, and to set her creditors at defiance.

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The liability of the husband, for the debt of the wife, and to be sued jointly with her in an action at law for the recovery of the same, is at an end by his discharge under the bankrupt act. (*Miles v. Williams*, 10 *Mod. Rep.* 160, 243; 1 *Peers Wms. Rep.* 249, *S. C.*) And no suit at law can be maintained against the wife, during the life of the husband, without joining him with her in the same suit. The remedy at law is therefore suspended as to the wife, or her estate, during the coverture. There is no doubt that the certificate of bankruptcy is an absolute discharge of the husband, and his estate, from all further liability for the debt of his wife. I think the reasoning of Chief Justice Parker in *Miles v. Williams* is conclusive on that point. He indeed intimates an opinion that the certificate of the husband will operate as an absolute discharge of the wife, even after the death of her husband. But he admitted there was no such question in the cause which he was considering. Nor was there any thing in the English bankrupt act which, in terms or by implication, made the discharge of the husband a discharge of the debt as to the wife, and her estate. The seventh section of that act declared that the bankrupt should be discharged from all debts which he owed at the time he became a bankrupt, and that if he should be sued for any such debt, he should and might plead generally that the cause of action accrued before he became bankrupt. But there is not a word in the act as to the discharge of the bankrupt's wife, or her separate estate, or her reversionary interest in her real estate after the death of her husband. Nor is there any thing in our bankrupt act of 1841, which discharges the debts, as against the wife, by the discharge of the liability of the husband. Indeed, it would be manifestly unjust and inequitable to discharge the wife absolutely, and permit her to enjoy, or to dispose of for her own use, property which might have been reached by her creditors if her husband had not been discharged upon the surrender of his own property merely, and of that which belonged to him in right of his wife. The remedy by action, therefore, as against the wife, and her estate, is only suspended by the discharge, during coverture. And where she survives her husband, ac-



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tions at law may be maintained against her for the debts which she contracted before her marriage; in the same manner as if her husband had not been discharged from his liability. For upon the death of the husband, the debts contracted by her before the marriage, and which have not been recovered of her and her husband during her coverture, survive against her; and the estate of her husband is not liable therefor. (*Woodman v. Chapman*, 1 *Camp. Rep.* 189. *Chapline v. Moore*, 7 *Monr. Rep.* 175.) On the other hand, where the husband survives the wife, although he is no longer liable for debts contracted by her while sole, however much he may have received by the marriage, her separate estate in the hands of her personal representatives is liable for those debts. (*McKay v. Allen*, 6 *Yerg. Rep.* 44.)

The debt in this case still existing as against the wife, and her property which belonged to her before marriage, and which is now holden for her separate use, and the remedy at law being suspended by the discharge of her husband, I think the vice chancellor is right in supposing the complainants could come into this court to reach her property and have it applied to the payment of their debt.

If a precedent were wanting, I should deem it my duty to make one in such a case. For where rights exist, and the remedy at law is inadequate to meet the equity and justice of the case, it is a part of the ordinary jurisdiction of this court to provide for such cases as they occur. But we have a precedent in the case of *Briscoe v. Kennedy*, (1 *Bro. C. C.* 18;) decided at the rolls in 1762, during the mastership of Sir Thomas Clark. There the creditor had no remedy by action against the husband and wife, because the husband had absconded, and the complainant had proceeded to outlawry against him; and had seized all his property, without being able to obtain satisfaction of the debt due from the wife. (*See 2 Wils.* 127.) The creditor then filed his bill in chancery to obtain payment of the wife's debt out of her separate estate. The defendant's counsel, in that case, as in this, insisted that the wife's separate estate, during the life of her husband, was not liable for the

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debt contracted by her before marriage. But his honor decided that the effects of the wife, vested in her trustee for her separate use, were to be considered as the property of a feme sole. He therefore ordered the stock belonging to her separate estate to be appropriated to the payment of the complainant's debt and costs.

The husband, in this case, was a necessary and proper party, not only to defend the suit for the wife, but also as the trustee of his wife, whose concurrence in the sale and transfer of the trust property was necessary to vest the legal title in the purchaser. For, as there was no other trustee, the legal title was vested in him, for the benefit of the wife, by the transfer of the stock into her name for her separate use. And as he had no beneficial interest in the property, the legal title did not pass to the assignee in bankruptcy.

The decretal order appealed from was not erroneous; and it must be affirmed with costs.

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Where a bill is filed by the committee of a lunatic, to set aside an act done by such lunatic, upon the ground of his incompetency, it is not *necessary* that the lunatic himself should be made a party; but he may be joined, as a party, with his committee.

In all other cases, the settled practice in England has always been, either to join the committee with the lunatic, in bringing suits in chancery for his benefit, or to file the bill in the name of the lunatic, by his committee. And where the lunatic is not made a party to the bill, or information, in his behalf, it is a good cause of demurrer. The same rules are applicable to suits brought in the courts of equity in this country, for the benefit of lunatics.

When it is said, by English writers, that idiots and lunatics must sue by their committees, it is not meant that the suit is to be brought by the committee in their own names merely describing themselves as the committee of the lunatic: but that the suit is to be brought in the name of the lunatic, stating that he sues by the committee of his estate, naming them, as in the case of an infant suing by his next friend; or that the suit should be prosecuted in the names of the lunatic and of his committee.

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A bill filed by the committee of a lunatic, in their own names, in which they only describe themselves as his committee, is a bill by the committee alone; and is not the bill of the lunatic, by his committee. And a decree in favor of the complainants would not be a decree in favor of the lunatic.

A bill filed by a committee, in that manner, praying for a partition of lands and for an account and payment of rents and profits of the share of the land belonging to the lunatic, is defective in form. And if the objection that the lunatic is not made a party to the suit, with his committee, is set up by the defendant, as a special cause of demurrer, no part of the bill can be sustained.

The objection that the lunatic himself is not made a party complainant, in a suit brought by his committee in relation to personal estate, may be waived by the defendant's neglecting to set it up by demurrer or answer; and it cannot be raised merely by a general demurrer for want of equity.

The court of chancery, during the continuance of the lunacy, by statute, has the whole control of the personal estate and choses in action of the lunatic. And it can transfer the title to the same, by directing a sale by the committee; and it may direct the committee to release any right of action in relation thereto, as may be equitable and just. So that when a matter relating to the personal estate of the lunatic has been fairly litigated by the committee, in that court, and decided against them, the court may protect the defendant against a new suit, by the lunatic or his representatives, although the lunatic was not a formal party to the suit brought by his committee; by directing the committee to transfer the property which was in litigation, to the defendant, or to release him from any further claim on account thereof.

The question whether a suit can be commenced in the name of a committee of a lunatic, for the recovery of real estate, or to establish the title to the same, or whether a suit in partition can be instituted in the name of such committee without joining the lunatic as a party, is wholly unaffected by the act of 1845, authorizing committees to sue in their own names.

A lunatic is a necessary party to a bill, filed by his committee, for the partition of his real estate. For a decree in partition, upon a bill filed by the committee alone, and to which the lunatic is not a party, will not transfer the legal title to his undivided share of that portion of the premises which is set off to the defendant in severalty.

There is no statute, in this state, authorizing the committee of a lunatic, or of an habitual drunkard, to prosecute a suit for partition in their own names alone; or authorizing another person to prosecute a partition suit against them without making the lunatic, or the habitual drunkard, who is an actual owner of an undivided part of the premises, a party to the suit. And the only way in which a legal partition can be made of the real estate of a lunatic, or an habitual drunkard, except by an agreement between the committee and the other tenants in common, with the concurrence of the court, is to make him an actual party to the suit for partition.

By making a lunatic, or an habitual drunkard, a party to a suit for partition, his legal title to that portion of the premises which may be set off to the adverse party, in severalty, will pass, without any conveyance, either from the lunatic, or the ha-

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bitual drunkard, or from his committee; under the provisions of the revised statutes relative to the partition of lands.

The cases of *The Executors of Brasher v. Van Cortland*, (2 *John. Ch. Rep.* 242, 400,) and of *Beach v. Bradley*, (8 *Paige's Rep.* 146,) commented on and explained.

THIS was an appeal from a decretal order of the vice chancellor of the seventh circuit. The complainants were the committee of the person and estate of an habitual drunkard. And the bill in this cause was filed for the partition of lands, owned by the drunkard and the defendant as tenants in common; and also for an account and payment of the drunkard's share of the rents and profits of the premises which the defendant had received, including the drunkard's share of the wood and timber which had been taken from the premises by the defendant. The bill described the complainants as the committee of the person and estate of the drunkard. But it did not purport to be the bill of the drunkard himself, by his committee. Nor was he joined with the committee as one of the complainants therein. The defendant put in a general demurrer for want of equity; but without stating as a ground of demurrer, that the drunkard himself was not made a party, or making any other specific objection to the form of the bill. The vice chancellor overruled the demurrer. And from that decision the defendant appealed.

*W. Porter, Jun.* for the appellant. The bill in this cause is improperly filed in the name of the committee. The habitual drunkard should be the complainant. The revised statutes (2 *R. S.* 242, § 1, 2d ed.) declares who may be parties complainants in partition suits. The 80th section of the same title, (*Idem*, 253,) declares that the same rules as to parties shall apply in chancery as at law. In a case of that kind, the intention of the legislature was that the lunatic should be made a party. (*Idem*, 256, §§ 96, 97, 98.) The complainants, as the committee of the habitual drunkard, are mere bailiffs, or receivers, and have no personal or representative interest in the drunkard's property; and should not be complainants in a case

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like this. (*Shelf. on Lunacy*, 179, 180, 339, 395. 1 *Collinson on Lunacy*, 270. 1 *Cas. in Ch.* 112, 153. *Petre v. Shoemaker*, 24 *Wend.* 85. 3 *Salk.* 300. *Lane v. Schermerhorn*, 1 *Hill*, 97, 98. *Willis' Eq. Pl.* 5, note (u). 1 *Fonb. Eq.* 67 and 68, note (n). *Story's Eq. Pl.* 67, note 1.) The case of *Ortley v. Messere*, (7 *John. Ch. Rep.* 139,) is not hostile to this position, but falls within one of the exceptions mentioned by Foulblanque. The doctrine of Judge Story, (*Story's Eq. Pl.* 65, 67, 68,) as to committees filing bills in their own names, derives its principal strength from the case of *Ortley v. Messere*; which is aliter so far as the doctrine sought to be established by Judge Story is concerned, and it is in conflict with all previously adjudged cases. There seems to be no necessity for departing from the well established general principle, in equity, which limits parties to those persons who are interested in the proceeding, or whose names are necessary to a decree, by making the case of the committee of a lunatic, &c. an exception to the rule. Allowing such committees to file bills in their own names, as sole complainants, would be increasing the already too great discrepancy in the principles and proceedings which prevails between the courts of law and courts of equity; which should be avoided. But even if it would have been regular, under the permission and in the exercise of discretion of the court, for the committee to file this bill in their own names, such permission or direction surely should appear upon the face of the bill. Otherwise the complainants appear as naked agents; prosecuting in their own names, and having no statutory or judicial authority so to do.

The defendant is not liable to his co-tenant for the occupancy and enjoyment of all the premises, except where such occupancy has been under a lease from such co-tenant, or in defiance of his rights. This bill does not allege that there were any rents, issues or profits of the premises during the time the defendant is alleged to have occupied the premises; but simply that the defendant by himself or his tenants occupied and enjoyed all the premises, &c. Even had the bill alleged that there were rents and profits of the premises and that the defen-

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dant had received them, this of itself would not lay a foundation for a suit here, for an account; without alleging that there was some obstacle to a recovery at law, or that there were mutual accounts. The charge in the bill that the defendant during the time of his occupying the premises, cut and sold wood and timber growing thereon, and received the pay therefor, amounts to a charge of waste; for which a bill in chancery cannot be filed. (*Winship v. Pitts*, 3 *Paige*, 259.) And the charge that the defendant cut and sold the wood and timber on the rail-road land, amounts to nothing more than a conversion by one tenant in common of the joint property; for which an action of trover is the proper remedy. When the statute creates a right and at the same time gives the remedy, that remedy must be pursued. (*Durant v. Supervisors of Albany*, 26 *Wend.* 89. 5 *John. Rep.* 175. 3 *Hill*, 41. 3 *Mass. Rep.* 307. 5 *Id.* 514.) The right of a tenant in common, or of a joint tenant to an account against his co-tenant, does not exist at common law, but was first given by the statute of Westminster, which statute has been re-enacted in our own statutes. (1 *R. S. 2d ed.* 741, § 9.) The only remedy there prescribed is by an action of account, or an action for money had and received. This court may decree an account as *incidental* to a decree for partition; for the reasons stated in *Winship v. Pitts*, (3 *Paige*, 259.) But the portion of the bill for partition failing, for want of proper parties, that portion relating to the account of the rents and profits and for the waste, must fail with it; it appearing that the complainant has a remedy at law for the rents and profits.

The jurisdiction of chancery in partition cases is statutory, and the statutory directions, especially as to parties, must be strictly followed. This bill, therefore, should be dismissed with costs, and proceedings *de novo* commenced, under the provisions of the revised statutes relative to the partition of lands

*F. G. Jewett*, for the respondents. The practice of the court in this state does not make it necessary that idiots, lunatics, or persons who are duly found incapable of conducting

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their own affairs in consequence of habitual drunkenness, for whom a committee has been appointed, should be made parties with their committee, either as complainants or defendants, in any suit or proceeding affecting their estates; their committee as such may sue and be sued. This point is settled by adjudged cases in this court. (2 *John. Ch. Rep.* 242, 400. 7 *Id.* 139. 3 *Paige's Rep.* 470. 1 *Moulton's Pr.* 102.) Judge Story, in his Commentary on Equity and Pleadings, (*Story's Eq. Pl.* § 65,) says that in some of the states in America the courts of equity are entrusted with the authority to appoint committees for idiots and lunatics; and that in such cases the idiots and lunatics sue by their committees. "Thus, for example in New-York, by statute, the court of chancery has the care and custody of idiots and lunatics, and entire jurisdiction over the subject in all its general relations." The case of *Ortley and Baker, committee of Sperry, a lunatic, v. Messere and others*, (7 *John. Ch. Rep.* 139,) is full to show that a lunatic is not a necessary party, as a complainant, with his committee. The same objection was made in the case of *The Attorney General on behalf of Smith, a lunatic, v. Parkhurst*, (1 *Chancery Cas.* 112,) and was overruled. In another case, (*Kidder v. Kidder*, 1 *Equity Cas. Abr.* 279,) the bill was by the lunatic and his committee, to set aside a settlement made by him while a lunatic. And there was a demurrer because the lunatic was a party; but the demurrer was overruled. It should seem, as Chancellor Kent says, to be immaterial and but matter of form. The lunatic may be joined with the committee or omitted, according to the cases. (7 *John. Ch. R.* 140.) He says, "There was a distinction suggested in the case of *The Attorney General on behalf of Woolrich v. Woolrich*, (1 *Ch. Cas.* 153,) between the case of a bill to set aside an act done while the party was insane, and a bill to set aside an act done before he was a lunatic; but that distinction is not to be found in the two cases which have been cited. The general practice however is, to unite the lunatic with the committee, as was done in 2 *Vernon*, 678. But there does not appear to be any necessity for it; as the committee have the exclusive custody and con-

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trol of the estate and right of the lunatic. The lunatic may be considered as a party by his committee, and like trustees of an insolvent debtor, the committee hold the estate in trust under the direction of the court." In the case of *Teal v. Woodworth*, (3 *Paige's Rep.* 470,) the chancellor cited the case of *Brasher's executors v. Van Cortland*, (2 *John. Ch. Rep.* 242,) with approbation.

Although the drunkard may be a proper party, it does not follow that he is a necessary party. And if not a necessary party, the demurrer is not well taken. For in all such cases it is at the election of the party to unite the lunatic or drunkard with his committee or not. (2 *Paige*, 278.) The statute has given the court of chancery exclusive jurisdiction over the estate of idiots, lunatics and habitual drunkards, except in a few cases when concurrent jurisdiction, in case of drunkards, is given to the court of common pleas. (1 *R. S.* 2d ed. 813. 3 *Paige*, 199.) This court therefore will not permit any action to be brought or sustained against a person whose estate is under the care and management of a committee; and if an action at law is brought for the recovery of a debt against such person, this court will restrain the proceeding by injunction, and will compel the party to come to this court for justice, by bill or petition. (2 *John. Ch. Rep.* 242. 3 *Paige*, 199.)

The general practice in England, is to unite the lunatic with his committee, as the complainants, in a suit affecting his estate. Although formerly it was a rule that the lunatic should not join with his committee in a suit, to be relieved against an act done during his lunacy. (2 *Barb. Ch. Prac.* 223. *Story's Eq. Pl.* 65, 66. *Hoff. Pr.* 61.) Mr. Barbour says, "Bills on behalf of a lunatic are usually instituted in the name of the lunatic; but as he is a person incapable in law of taking any steps on his own account, he sues by his committee." It will be seen on reference to the *Matter of Congdon*, (2 *Paige's Rep.* 566,) to which he refers, that it was an application by the general guardian of an infant tenant in common, by petition, praying for an order for leave to sell the infant's undivided share of lands to the adult owners of the other shares. And



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Mr. Hoffman refers to the same English cases, to which Barbour refers, to show that lunatics generally sue by the committees of their estates. All these cases agree that, it is not necessary to make a lunatic a party to a bill to avoid acts done by him while under mental incapacity. The bill may be filed by the committee alone; but if the lunatic is joined with his committee, it is not demurrable. It is as necessary, by the English chancery practice, that a lunatic should be made a party defendant with his committee, as it is that he should be made a party complainant with his committee. (*Story's Eq. Pl.* 70. *Mitford's Pl.* 103. 1 *Dick. Rep.* 233. *Copper's Pl.* 31, 32.) But the practice of the court in this state does not require that the lunatic should be made a party, either complainant or defendant, with his committee, unless the committee of the lunatic has a personal interest in the controversy, and when such interest may or necessarily must conflict with that of the lunatic. In such cases the lunatic should be made a party; so that the court may assign him a guardian to appear and protect his rights as against the committee. (2 *John. Ch.* 242, 400. 7 *Id.* 139. 3 *Paige's Rep.* 470.)

THE CHANCELLOR. In some of the earlier decisions in the court of chancery, in England, it was settled that where a bill or information was filed to set aside an act done by a lunatic, upon the ground of his incompetency, it was not necessary that the lunatic himself should be made a party. The case of *Attorney General v. Parkhurst*, (1 *Ch. Ca.* 112,) which is one of the cases alluded to, was settled upon great consideration; being first decided by Mr. Justice Tirlrell, sitting for the lord keeper, and afterwards affirmed, upon a rehearing, by Sir Orlando Bridgman, assisted by some of the judges. The decision was probably based upon the principle that the lunatic should not be compelled to stultify himself. And I am not aware that it has ever been overruled. It was therefore properly followed by Chancellor Kent, in the case of *Otley & Baker v. Mesiere*. (7 *John. Ch. Rep.* 139,) where a bill was filed by the committee of the lunatic to set aside acts done by the lunatic when he

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was incompetent. It was not intended, however, in the case of the *Attorney General v. Parkhurst*, to decide that the attorney general or the committee could file an information or a bill for the benefit of a lunatic, in all cases, without joining the lunatic himself as a party. For in the case of *Palmer, attorney general, v. Woolrich*, (1 *Ch. Cas.* 153,) which was decided the next year by the same lord keeper, Sir Orlando Bridgman, he allowed a demurrer to a bill filed by the attorney general, for the benefit of a lunatic, upon the ground that the lunatic was not a party; the bill in that case not being brought for the purpose of avoiding any act done by the lunatic after the loss of his reason. And this decision was in conformity with the note at the end of the report of the case of *Fuller v. Lance*, (1 *Ch. Cas.* 19,) which was decided six years previous to that time. In accordance with this decision, the bills in the cases of *Clark v. Clark*, (2 *Vern.* 412,) and *Addison v. Dawson*, (*Idem*, 678,) which came before the court in 1700, and 1711, appear to have been filed in the name of the lunatic, by his committee; in the same manner that an infant files a bill by his next friend. In 1729, the question came before Lord Chancellor King, in the case of *Ridler v. Ridler*, (1 *Eq. Ca. Abr.* 279,) whether the lunatic was at liberty to join with his committee in a bill filed to set aside a deed of settlement obtained from him after he became a lunatic; the defendant having objected by demurrer that it was against the maxim of law to permit a party to stultify himself. And his lordship decided that the lunatic might be a party to the bill, for that purpose, with the committee. The result of these several decisions was, that where the object of the bill was to set aside the act or deed of the lunatic upon the ground of his mental incapacity at the time the act was done, or the deed was executed, the bill might be filed by the committee, or the attorney general alone; or by joining the lunatic with the committee, or with the attorney general when there was no committee, or when the interest of the committee was adverse to that of the lunatic. And the practice in England, ever since that time, appears to have been either to join the committee with the lunatic, in bringing suits for his bene-

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fit, or to file the bill in the name of the lunatic, by his committee. Thus in a case before Lord Thurlow, in 1791, (2 *Dick. Rep.* 748.) where a bill was filed against the committee, by the attorney general in behalf of the lunatic, it appears to have been filed by him on the relation of the lunatic, and by the lunatic himself as an informant and plaintiff also. In the *Practical Register* it is also stated that lunatics must generally sue and answer by their committees; and if the lunatic is not named a party in the bill, or in an information by the attorney general, it is commonly a good cause of demurrer. But an exception is made in the case where the object of the suit is to relieve the lunatic against some act done by himself during the lunacy. (*Wyatt's P. R.* 272.) Lord Redesdale also says, idiots and lunatics sue by the committees of their estates; and where their interests clash with those of their committees, the attorney general files an information in their behalf; but in that case a proper relator must be named who will be responsible for the costs. In the unreported case, referred to by him to show that the attorney general is the proper person to institute a suit for one who has been found a lunatic and where no committee has been appointed, the information appears to have been filed by the attorney general on behalf of the lunatic Maria Lapine, on the relation of a third person; and the lunatic herself was also joined in the suit as a complainant. (*Mit. Pl. 4th Lond. ed.* 29.) And this was in conformity to the decision of Lord Keeper Bridgman in the case of *Palmer, attorney general, v. Woolrich*, before referred to, and the subsequent decisions of Sir Thomas Sewel and of Lord Northington, that some third person must be named as a relator who would be responsible for the defendant's costs if the suit was not sustained. (See *Attorney General v. Tyler*, 1 *Dick.* 378; 2 *Eden*, 230, *S. C.*) Cooper, Lubé, and Welford, in their several treatises on equity pleading, say, that idiots and lunatics must exhibit their bills by the committees of their estates; and the last mentioned writer says, where the committee sues for any thing, the committee as well as the lunatic is made a party. (*Coop.* 31. *Lubé*, 22. *Welf.* 22.) And Willis gives the form of the com-

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mencement of a bill where the committee and the lunatic both join as complainants, instead of filing a bill in the name of the lunatic by his committee. (*Willis' Eq. Pl.* 5.) Shelford also says, that idiots and lunatics must sue in courts of equity by the committees of their estates, and in such suits the committee as well as the lunatic should be parties; and if a lunatic is not named a party in a bill or information in his behalf, it is a good cause of demurrer. (*Shelf. on Lun.* 415. *See also Stock's Law of Non Com. Ment.* 33, and *Calv. on Parties*, 303.) The late Judge Story, after stating the principles of the English law on the subject, and the authority of the great seal to appoint committees of idiots and lunatics, lays down the same rules as applicable to courts of equity in this country. (*Story's Eq. Pl.* § 65.)

When it is said, by these writers, that idiots and lunatics must sue *by* their committees, it is not meant that the suit is to be brought by the committee in his own name, merely describing himself as the committee of the lunatic, as has been erroneously supposed by the court of one of our sister states. But they mean that the suit should be brought in the name of the lunatic, stating that he sues by the committee of his estate naming them; as in the case of an infant suing by his next friend. Or that the suit should be prosecuted in the names of the lunatic and of his committee, as in the precedent in *Willis' Pleadings*, before referred to.

In the case under consideration, the bill is filed by the committee in their own names, and they only describe themselves as the committee of the habitual drunkard. This, therefore, is a bill by the committee alone; and is not the bill of the habitual drunkard by his committee. And a decree in favor of the complainants, in this suit, would not be a decree in favor of the habitual drunkard. (*See Southerland v. Goff*, 5 *Port. Alab. Rep.* 508.)

I think, therefore, the bill was defective in form, even as far as it sought an account and payment of rents and profits which had become a part of the habitual drunkard's personal estate, at the commencement of this suit. And if the objection that

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he was not made a party to the suit with his committee, had been stated as a special cause of demurrer, I think the demurrer to the whole bill ought to have been sustained on that ground. But the statements in the bill as to the rights of the habitual drunkard, and the prayers for relief, except the general prayer, are in the proper form to enable the court to make a final decree for the payment of the habitual drunkard's share of the rents and profits of the premises to his committee, for his use and benefit; so as to protect the defendant from a second recovery for the same matter, in case the habitual drunkard should die or be restored to the possession and control of his property. For that reason, a general demurrer to the whole bill, for want of equity, was not well taken; as the objection was merely formal as to the part of the bill which sought for an account and payment of rents and profits. And the habitual drunkard, by his committee, had a right to file a bill in this court against the defendant, as his co-tenant in common, for such account and payment, independent of the claim for a partition of the premises.

The reason why the lunatic himself should be a party to a suit for the recovery of property claimed to belong to him is, that, in case the defendant should succeed in his defence, he may not be subjected to a second litigation for the same matter, by the lunatic, should he be restored to the possession and control of his property; or by the representatives of the lunatic after his death. For a suit prosecuted in the name of the committee alone, who are the mere bailiffs of the crown in England, and of the court of chancery in this state, would not estop the lunatic, or his legal representatives, from litigating the same matter over again, after his restoration to his reason, or upon his death. That is a right which the defendant may waive, by neglecting to make the objection by demurrer, or answer, that the lunatic himself is not made a party complainant in the suit.

Again; in this state the court of chancery, during the continuance of the lunacy, has, by the statute, the whole control of the personal estate and choses in action of the lunatic. And it can transfer the title to the same, by directing a sale by the

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committee; and may direct the committee to release any right of action in relation thereto, as may be equitable and just. So that when a matter relating to the personal estate of the lunatic, has been fairly litigated by the committee in this court, and decided against them, the court may protect the defendant against a new suit, by the lunatic or his representatives, although the lunatic is not a formal party to the suit brought by his committee; by directing the committee to transfer the property which was in litigation, to the defendant, or to release the defendant from any further claim on account thereof. The objection of the non-joinder of the lunatic, as a party complainant, with his committee in such a suit, appears, therefore, to be a matter of form and not of substance. And it is not such an objection as can avail the defendant upon a general demurrer for want of equity only. For if the objection which is urged upon this appeal, had been stated in the demurrer, it might have been obviated by a slight amendment of the bill.

An objection for want of necessary parties might have been made *ore tenus*, upon payment of the costs of the demurrer upon the record; but that does not appear to have been done in this case. And it is now wholly immaterial to the defendant whether the suit is prosecuted in the name of the habitual drunkard, by his committee, or by the committee of his estate in their own names only, so far as the rents and profits of the premises are concerned. For, since this appeal the legislature has authorized the committee of a lunatic or an habitual drunkard to sue in their own names, for any debt, claim, or demand, transferred to them, or to the possession and control of which they are entitled as such committee. (*Laws of 1845*, pp. 91, 92.) But the question whether a suit can be commenced in the name of the committee alone for the recovery of real estate, or to establish the title to the same, or whether a suit in partition can be instituted in the name of such committee, without joining the lunatic or habitual drunkard as a party, is wholly unaffected by the act of 1845. If the committee have no such right, the objection that the habitual drunkard is not made a party, is a matter of substance, in the

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present case; so far as the bill seeks a partition of the real estate owned by him, and by the defendant, as tenants in common. And, upon a careful examination of the law, as it existed previous to the revolution, and the various statutory provisions on the subject of idiots, lunatics, &c. in this state, I am satisfied that a decree in partition, to which the habitual drunkard is not a party, will not transfer the legal title to his undivided share of that portion of the premises which may be set off to the defendant in severalty.

In England, the care and custody of idiots and lunatics and their estates, by the common law as well as by the statutes, (17 *Edw. 2*, ch. 9, 10,) belonged to the king as *parens patriæ*. (*Beverly's case*, 4 *Coke*, 127.) And the power of the crown in this respect was exercised by the keeper of the great seal, under special warrants from the crown from time to time, and did not belong to the court of chancery as such. But the statute 17th Edward 2, ch. 10, did not authorize the sale of the lands or tenements of a lunatic. On the contrary, it directed that the same should be safely kept, and not aliened. (1 *Evans' Stat.* 473. *Ex parte Dikes*, 8 *Ves. Rep.* 79.) In the case of a lunatic, therefore, the great seal, acting as the representative of the crown, under the sign manual, could only grant the care and custody of the lunatic and his estate during pleasure. And upon the restoration of the lunatic to his reason, he was entitled to have his lands restored to him with an unimpaired title. Or, if he died before the restoration of his reason, such lands went immediately to his heir, unaffected by any leases made in the meantime. Even in the case of idiots, although the king had a beneficial interest in the surplus rents and profits of the real estate, during the life of the idiot, beyond what was necessary for his support, the statute 17 Edward 2, ch. 9, did not allow the alienation of the estate beyond the life of the idiot; but expressly directed that after his death the estate should be surrendered to his heirs; so that they should not be disinherited. Such was the state of the English law in regard to the real estate of idiots and lunatics at the time of the settlement of this country; and it became a part of the

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common law of the colony of New-York. Several statutes were subsequently passed in relation to the surrender and renewal of leases of the estates of lunatics, during the reigns of George the second and his successor. But if they were ever in force here, they were repealed, after the close of the revolution, by the general law on that subject.

Our statute of February, 1788, (2 *Greenl. Laws*, 25,) substituted the chancellor for the crown in relation to the persons and estates of idiots and lunatics; and expressly prohibited the alienation of the lands or tenements of either. In the revision of 1801 the language of the act was somewhat varied; for the committee was directed, in case the personal estate of the idiot or lunatic was not sufficient to pay his debts, or where such personal estate and the income of the real was not sufficient for his maintenance and that of his family, to apply to the chancellor, by petition, for a sale of so much of the real estate as should be necessary for that purpose. The chancellor was also authorized to decree a specific performance of contracts made by lunatics before their lunacy, and to authorize the committee of an idiot or lunatic to agree to a partition of lands held in common with other persons. But the sixth section of the revised act of March, 1801, (1 *R. L. of 1813*, p. 148,) expressly provided that the real estate of an idiot or lunatic should not be aliened or disposed of, otherwise than as directed by that act. The same provisions, in substance, are contained in the title of the revised statutes relative to the custody and disposition of the estates of idiots, lunatics, persons of unsound mind, and drunkards. (2 *R. S.* 52.) The twenty-third section of that title prohibits the leasing of the real estate for more than five years; and declares that it shall not be mortgaged, aliened, or disposed of, otherwise than as directed in that title.

It was under the revised act of 1801 that the case of *The Executors of Brasher v. Van Cortlandt*, (2 *John. Ch. Rep.* 242, 400,) arose and was decided by the late Chancellor Kent. When the case first came before him, I think he very correctly decided that it was not necessary to make the lunatic a party to a suit against his committee to compel them to sell his real



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estate for the payment of the debt due from the lunatic to the complainant. The court had no power to decree a conveyance by the lunatic for that purpose, even if he was a party to the suit. Nor was there any statute, or any principle of the common law, which would have enabled the court to transfer the legal title of the lunatic's land, to a purchaser, merely by the deed of a master, executed in pursuance of a decree of the court. But the statute had made it the duty of the committee of the lunatic to apply to the court for a sale of the real estate for the payment of debts, where the personal estate was not sufficient for that purpose. The court, therefore, had the right, upon an application of a creditor, to compel the committee to comply with the provision of the statute, in that respect, by a summary proceeding in the matter of the lunacy. Or if the debt was unliquidated, or the right of the creditor was disputed, it might be a proper case to file a bill, by the permission of the court, for the purpose of settling the right to the debt, and to compel the committee to make the proper application, and obtain an order authorizing a sale, &c.; and in such a suit I do not see any valid ground of objection, on the part of the committee, that the lunatic himself was not made a party defendant. For the whole burthen of the defence of the suit must necessarily rest upon the committee, even if the lunatic himself was a party. And his presence as a party was not necessary to enable them to apply and obtain the authority of the court to sell and convey the property, in the manner authorized by the statute. The complainants, it is true, might have an interest in making the lunatic a party, so that the decree establishing their debt would be final and conclusive against him and his representatives, in case he should be restored to his reason, or should die before an actual sale of his property by the committee under the authority of the court. It was upon that ground that I decided, in the case of *Beach v. Bradley*, (8 *Paige's Rep.* 146,) that the lunatic might be a proper party, though not a necessary party, to such a bill filed against his committee. When the case of *The Executors of Brasher v. Van Cortlandt*, came the second time before Chancellor Kent, he, unquestionably, meant

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to decide that the title of the lunatic to real estate might be sold and conveyed for the payment of his debts, without the presenting of a formal petition, by the committee, provided the other formalities required by the statute on the subject were substantially complied with. But, I do not understand my learned predecessor as deciding, or even intimating an opinion, that there was any other way in which the legal title could be transferred to the purchaser, under the sale which he directed to be made, than by a deed duly executed by the committee of the lunatic, pursuant to the provision of the statute making it their duty to sell and convey the real estate of the lunatic for the payment of his debts. How that case was ultimately disposed of does not appear; as the decree for a sale required such sale to be reported to the court, for further directions, before any conveyance should be made to the purchaser. Although the act of March, 1801, authorized the chancellor, in his discretion, to join one or more persons with the committee in making a sale for the payment of debts, &c. and the master was properly joined with the committee, I have great doubts whether the legal title to the property could be conveyed to a purchaser in any other manner than by a compliance with all the forms required by the statute. For the act itself expressly declared that the real estate should not be aliened or disposed of in any other way. And I think the decree in that case, the existence and validity of the debt having been ascertained, should have directed the committee to present a petition in the form prescribed by the statute; and that, upon the granting of the prayer thereof, such committee, either in conjunction with the master or otherwise as the court might think proper to direct, should sell so much of the real estate of the lunatic as was necessary for the payment of the complainant's debt, including costs, and should execute a good and sufficient deed to the purchaser, and pay the complainant's demand out of the proceeds of the sale. And the court might have enforced a compliance with the directions of such a decree by attachment against the committee, or by removing them and appointing others in their place.

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Here the committee of the habitual drunkard have no power to convey the real estate for the purpose of carrying into effect a decree of the court in a partition suit ; though such committee, with the sanction of the court, may consent to a voluntary partition between the habitual drunkard and his co-tenant in common. Nor is there any statute authorizing the committee to prosecute a suit for partition in their names alone ; or authorizing another person to prosecute a partition suit against them without making the habitual drunkard, who is the actual owner of an undivided part of the premises, a party to the suit. The only way, therefore, in which a legal partition can be made of the property of an idiot, or lunatic, or an habitual drunkard, except by an agreement between the committee and the other tenants in common, with the concurrence of the court, is to make him an actual party. In that case his legal title to the portion of the premises which may be set off to the adverse party in severalty, or which may be sold by the commissioners, or the master, under the decree, will pass, without any conveyance, either from the idiot or lunatic, or habitual drunkard, or from his committee, under the provisions of the revised statutes relative to the partition of lands. (2 R. S. 323, §§ 36, 37, of 3d ed. *Idem*, 327, §§ 65, 66. *Idem*, 330, § 92.)

As there was a general demurrer to the whole bill, without specifying any cause of demurrer to that part of the bill as to which the habitual drunkard would have been a mere formal party, it was proper to overrule the demurrer. It should have been overruled, however, without prejudice to the right of the defendant to insist, by his answer, that the habitual drunkard should have been made a complainant, with his committee, so far as the bill sought a partition of the premises ; and with liberty to the complainants to amend their bill by inserting his name as one of the complainants therein. The order appealed from must be modified accordingly. And neither party is to have costs as against the other upon this appeal.

## MANN vs. RICE.

Notice to the clerk to enter the appearance of the defendant is a proper charge, on the taxation of costs, where the defendant's solicitor did not attend the office in person, to have the appearance entered. But the solicitor is not entitled to an allowance for attendance upon entering such appearance.

An engrossment of an affidavit which is not to be filed, is not taxable.

The costs of an unsuccessful motion, or of an unsuccessful resistance to a motion, are not taxable against the adverse party as costs in the cause, unless a direction to that effect is contained in the order of the court. But the costs of a successful resistance to a motion are properly allowable, if the order denying the motion contains nothing to the contrary.

A defendant is not entitled to charge for a copy of his answer, to be used in opposing a motion, unless for some special reason, other than the negligence of his solicitor, it becomes necessary to make a new copy for that purpose.

Where the costs of a motion to dissolve an injunction are reserved until the hearing, they will abide the event of the suit, in case no special directions are given at the hearing. And if the event of the suit shows that in justice and equity the injunction never should have been granted, the defendant is entitled to the costs of the motion to dissolve it, as costs in the cause.

A charge for a brief, upon the settlement of interrogatories, is not taxable.

But a party is entitled to charge for solicitor and counsel attending upon the settlement of interrogatories, and arguing the same; that being, in substance, a reference according to the practice of the court, to a master to settle the interrogatories.

But the settlement of the interrogatories and cross-interrogatories should take place at the same time, and form but one proceeding. And after the interrogatories have been settled, the party is not entitled to charge for fees to solicitor and counsel upon the settlement of cross-interrogatories, at a subsequent time.

Copies of cross-interrogatories, as settled, for the party proposing them, and for the adverse party, are chargeable. But a notice that the copy served is a copy is not allowable.

A solicitor who serves a paper on the adverse party cannot be allowed an extra charge for giving him notice that the paper served is what it purports to be.

A notice, to the opposite solicitor, of the order to close the proofs, is not taxable. But a notice to the examiner, of the entering of such order, is proper.

After a bill has been dismissed, with costs, a copy of the opinion of the vice chancellor is not wanted by the defendant's solicitor for any of the purposes of the suit and ought not to be charged to the adverse party, upon taxation.

THIS case came before the chancellor upon the appeals of both parties from the taxation of the defendant's costs, by a vice chancellor, upon a dismissal of the complainant's bill with costs. Eighty-two items of the costs were objected to on the taxation

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some of which were allowed and others disallowed by the vice chancellor; and some were allowed by him only in part. The complainant appealed as to all the items which were not wholly rejected, and the defendant as to all the items which were not wholly allowed.

*B. F. Agan*, for the complainant.

*J. W. Thompson*, for the defendant.

THE CHANCELLOR. The affidavit which was used to sustain the objections upon the taxation, is so peculiarly framed that it is in most cases difficult to say whether the deponent meant to swear that he knew the disbursements charged were not made, or the services were not performed, or that he believed they were not; or merely intended to *object* that the disbursements were not made, or the services charged were not performed, or that they were unnecessary; or whether he meant to swear by Paige's Reports, that in point of law the charges were not taxable, even if the services were in fact performed or the disbursements actually made. And if the affidavit annexed to the bill of costs had been in the usual form, showing that the services charged were all actually performed and that the disbursements charged had in fact been made, I think the taxing officer should have rejected the affidavit on the other side altogether, except as containing written objections to particular items; and also excepting cases where the complainant's solicitor had sworn positively to facts within his own knowledge. But the affidavit annexed to the bill shows that, as to some of the charges, the deponent has not the means of knowing whether they are correctly charged against the complainant or otherwise. As to most of the items, therefore, which depended upon matters of fact, I think there is no ground for disturbing the decision of the taxing officer.

The notice to the clerk to enter the appearance of the defendant was a proper charge, if the defendant's solicitor did not attend the office in person to have the appearance entered,

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But the fifty cents, charged for the attendance of the solicitor upon entering the appearance, should have been rejected; as no allowance for such an attendance is contained in the fee bill.

Most of the charges for admissions of the service of papers, disallowed by the taxing officer, were not taxable under the decisions of this court in *Rogers v. Rogers*, (2 *Paige's Rep.* 465,) and *Putnam v. Ritchie*, (7 *Idem*, 44.) But the affidavit of the service of the cross-interrogatories, which was rendered necessary in consequence of the denial of the complainant's solicitor that he had been served with a copy of interrogatories on the part of the defendant, ought to have been allowed on the taxation. An engrossment of the affidavit, which was not to be filed, is not taxable.

The charges for brief and fee in attending to oppose the motion for a commission to examine J. J. Mann as a witness for the complainant, were properly rejected by the taxing officer, although the services were actually performed. For the costs of an unsuccessful motion, or of an unsuccessful resistance to a motion, are not taxable against the adverse party, as costs in the cause, unless a decision to that effect is contained in the order of the court. (2 *Barb. Pr.* 337. 1 *Sim. & Stu. Rep.* 357.) But the costs of the successful resistance to a subsequent motion for a commission were properly allowed; as no direction to the contrary was contained in the order denying the motion. (2 *Paige's Rep.* 52.) The charge for a copy of the answer to be used in opposing that motion, however, was properly disallowed. For the extra copy of the answer which is always allowed to the party to keep, should be used in all cases where it is necessary to exhibit a copy to the court upon the making or opposing of a motion; unless, for some special reason, other than the mere negligence of the solicitor, it becomes necessary to make a new copy to be used upon the motion.

The question as to the costs of the defendant's unsuccessful motion to dissolve the injunction, was expressly reserved until the hearing. In other words, those costs were to abide the event of the suit, if no special directions were given at the hearing. And as the event of the suit showed that the injunc-

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tion should have been dissolved, or rather that in justice and equity it never should have been granted, I think the vice chancellor was right in allowing the costs of that application, as costs in the cause. But he was also right in rejecting the charges for the unsuccessful attempt to bring on the motion at Sandy Hill, while the judge was engaged in the business of his circuit; as well as the charge for copies of the pleadings.

The charge for a brief upon the settlement of interrogatories, was properly disallowed; as no allowance for such a service is found in the fee bill. But the charges for solicitor and counsel attending upon the settlement of interrogatories and arguing the same, were proper. For it was in substance a reference, according to the practice of the court, to a master to settle the interrogatories. The settlement of the interrogatories and cross-interrogatories, however, should take place at the same time, and should form but one proceeding. The vice chancellor therefore properly disallowed the charges for fees to solicitor and counsel upon the settlement of the cross-interrogatories. The copies of the cross-interrogatories as settled, for the defendant, and to be served on the complainant's solicitor, were proper; as a copy was necessary to be annexed to the commission. But the notice that it was a copy should have been disallowed. For a solicitor who serves a paper on the adverse party cannot be allowed an extra charge for giving him notice that the paper served is what it purports to be; or rather, what it should purport to be. (2 *Paige's Rep.* 464.) The notice of the order to close the proofs, for the complainant's solicitor, was not necessary; as it is not required to be given. But the notice to the examiner should have been allowed; as it was proper to be served under the 87th rule of the court.

The copy of the opinion of the vice chancellor, after the bill was dismissed with costs, was not wanted by the defendant's solicitor for any of the purposes of the suit; and it ought not to be charged to the adverse party, upon taxation. The charge was therefore properly rejected by the vice chancellor. It is unnecessary to make any remarks as to other items allowed or rejected by the taxing officer, and brought in ques

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tion upon these appeals from his decision. For he disposed of the objections, upon the taxation, in conformity to the fee bill, and in accordance with the settled practice of the court in similar cases.

THE result of this examination of more than eighty objections to the costs as taxed, either by the one party or by the other, on these appeals, is that the vice chancellor allowed charges to the amount of eighty-seven cents which he ought to have rejected, and disallowed charges to the amount of eighty-five cents which he should have allowed to the defendant's solicitor; making the bill of costs, as taxed, two cents too much. But, to adopt a very free translation of a well known legal maxim, courts of justice do not permit the heavy artillery of the law to be used for the mere purpose of killing mosquitoes. I shall not, therefore, disturb the taxation of this bill of costs for this very unimportant error of the taxing officer. Both applications for a re-taxation must be dismissed, without costs to either party.

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 KIRBY and others vs. SCHOONMAKER and others.

[Distinguished, 61 How. 75.]

Where a partnership is dissolved by the death of one of the copartners, or where one or both of the copartners become bankrupt, or they are discharged under the insolvent acts, so that their property is placed in the hands of the assignees appointed by law to make distribution thereof, it is administered, in courts of equity, by applying the copartnership funds, in the first place, to the payment of the debts of the firm; and the individual funds of the several copartners to pay their individual debts respectively, before paying joint debts out of the same.

But where the copartners are administering their own funds, the copartnership creditors have no specific or preferable lien upon the joint funds; nor have the individual creditors any lien or priority of claim upon the separate property of their debtors.

It is only where neither the joint nor the separate creditors of the persons composing the firm can reach the property of their debtors, so as to obtain satisfaction by execution at law, that the equitable principle is applied of paying joint creditors out of the partnership property and individual creditors out of the separate property of their debtors; where there is not enough to pay both.



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Copartners may assign their individual property, as well as their partnership property, to pay the joint debts of the firm; thereby giving the creditors of the firm a preference, in payment out of the separate estate of the assignors, over the separate creditors.

And each copartner, with the assent of the others, has the corresponding right to give his individual creditors a preference in payment out of the share of the effects of the firm which, as between him and his copartners and without reference to the debts for which they are all jointly liable, is legally his own property.

Copartners may make an assignment of their respective interests in the partnership property to trustees, giving a preference in payment to the individual creditors of each copartner, out of his share of the partnership funds. But a partner who is insolvent and unable to pay the debts of the firm, has no right to assign his share of the partnership effects to pay the individual debts of his copartner, for which neither he nor his property is legally or equitably liable.

There is an equity existing between the members of an insolvent copartnership, by virtue of which any of them may insist that the copartnership effects shall be applied to the payment of the debts of the firm in preference to the payment of the private debts of the individual partners; and this gives to the creditors of the firm a quasi equitable lien upon the copartnership effects, if the members of the firm, or any of them, choose to give effect to such lien, by working it out for the benefit of the joint creditors.

But this equity of the members of the firm as between themselves, does not deprive them of the right to apply the partnership effects to the payment of their joint and separate debts as they please, provided no injustice is done to any of their creditors.

THIS was an appeal, by the complainant, from a decree of the vice chancellor of the second circuit, dismissing the bill of the complainants. J. B. Schoonmaker and L. Gasharie had been copartners in trade under the name of Schoonmaker & Gasharie, and as such copartners had become indebted to the complainants; who subsequently recovered a judgment for their debt, and an execution was issued thereon and returned unsatisfied. The object of this bill was to set aside an assignment which Schoonmaker and Gasharie had made, of all their individual and copartnership property for the payment of their debts. The assignment provided that, after paying, from the proceeds of the assigned property, a copartnership debt of \$500, the assignees should pay out of L. B. Schermerhorn's joint or separate portion of the proceeds, \$900 to his mother; \$550 of which was his separate debt, and the residue was the debt of the firm. And it provided for the payment out of L. Gasharie's

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joint or separate portion of such proceeds, \$600 to his mother; which was his separate debt. These individual debts were for moneys loaned to the partners, severally, to put into the firm as capital. But whether any other capital was put into the firm by either party, or what the respective shares of the partners in the property of the firm would have been if it had owed no debts, did not appear. Nor was it stated in the complainants' bill what amount of individual property was embraced in the assignment, or to which of the members of the firm it belonged. The complainants merely alleged that if there was any individual property it was small, and not sufficient to pay the two individual debts provided for in the assignment. The answer, however, admitted that Gasharie had no individual property, and that the amount owned by Schoonmaker was worth only \$150 at the time of the assignment. After payment of these three debts, the assignment directed the payment of two copartnership debts, and, if any surplus fund remained, that it should be paid to all the other creditors of the firm rateably. The cause was heard upon bill and answer.

*J. O. Linderman*, for the appellants.

*John Cole*, for the respondents.

THE CHANCELLOR. This bill is not properly framed to set aside the assignment as fraudulent. For no fraud is alleged; unless the mere fact of directing the payment of individual debts, out of copartnership property, rateably with and in preference to the debts of the firm, is necessarily a fraud upon the joint creditors, so as to render the whole assignment fraudulent. If the giving a preference to the individual creditors, or placing them upon an equality with the creditors of the firm, is merely inequitable in reference to a portion of the individual debts, but is not fraudulent, the bill should be filed in behalf of the complainants and the other creditors of the copartnership having a common interest with them. The only question for consideration in this case, therefore, is whether the case, as

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stated in the bill of the complainants, rendered the whole assignment fraudulent and void, so as to authorize them to file a creditor's bill for their own benefit, and to set aside the assignment as void.

Where a partnership is dissolved by the death of one of the copartners, or where one or both of the copartners become bankrupt, or they are discharged under the insolvent acts, so that their property is placed in the hands of the assignees appointed by law to make distribution thereof, it is administered, in courts of equity, by applying the copartnership funds, in the first place, to the payment of the debts of the firm; and the individual funds of the several copartners to pay their individual debts respectively, before paying joint debts out of the same. (*Wilder v. Keeler*, 3 *Paige's Rep.* 167. *Hall v. Hall*, 2 *McCord's Ch. Rep.* 302.) But where the copartners are administering their own funds, the copartnership creditors have no lien upon the joint funds; nor have the individual creditors any lien or priority of claim upon the separate property of their debtors.

The copartners, however, have certain equitable rights between themselves, arising out of the copartnership, by which either can compel the other to have all the effects of the firm applied, in the first place, to the payment of the debts due from them as copartners. And this, as is said in the books, gives the joint creditors a quasi equitable lien upon the property of the firm, to be worked out through the medium of the equity of the copartners as between themselves, and with their assent; or, at least, with the assent of one of them. (*Story on Part.* §§ 97, 326, 360.) I do not understand this rule to go so far as to deprive the partners themselves of the power, while they have the legal control of their property, of distributing it among all their creditors in such manner as they see fit; provided no actual injustice is done to any of such creditors. The copartnership creditors have an unquestionable right, upon a judgment recovered against all the members of a firm, for a partnership debt, to levy upon the individual property of any one of the judgment debtors, as well as upon the partnership effects;

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although such debtor should be insolvent, and not have the means to discharge his separate debts. (*McCulloh v. Dashiel*, 1 *Harr. & Gill's Rep.* 96. *Allen v. Wells*: 22 *Pick. Rep.* 450.) It is only where neither the joint nor the separate creditors can reach the property of their debtors, so as to obtain satisfaction by execution at law, that the equitable principle is applied of paying joint creditors out of the partnership property, and individual creditors out of the separate property of their debtors; where there is not enough to pay both.

Again; the co-partners may assign their individual property as well as their partnership property to pay the joint debts of the firm; thereby giving the creditors of the firm a preference in payment out of the separate estate of the assignors, over the separate creditors. And I can see no good reason why each co-partner, with the assent of the others, should not have the corresponding right to give his individual creditors a preference in payment out of the share of the effects of the firm which, as between him and his co-partners, and without reference to the debts for which they are all jointly liable, is legally his own property. The copartners certainly have the right to dissolve the partnership and divide the property of the firm between them, provided there is no intention of delaying or hindering their creditors in the collection of debts; thereby leaving their joint, as well as their separate creditors, to compete for a preference in payment. And if they may do this, they may make an assignment of their respective interests in the property to trustees, giving a preference in payment to the individual creditors of each copartner out of his share of the partnership funds.

That, as I understand it, is what has been done in this case. Gashaire had borrowed of his mother \$600, which he had put into the firm as capital, and Schoonmaker had borrowed of his mother \$550, which he had put in also, as capital. And all that the bill shows is that both assigned all their individual property and all the property of the firm, for the payment of their debts; giving a preference in payment to the creditors of the firm over their separate creditors, except as to these two

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individual debts. These debts were not directed to be paid out of the effects of the partnership generally, but the separate debt of each copartner was directed to be paid out of his portion of the proceeds of the joint property and of his separate property. What the share of each in the joint property was, does not appear. But probably each was entitled to one half, as the amount of money loaned to each to put in as capital was about the same. Upon this state of the case, and in the absence of any thing to show that there was an intention of defrauding the complainants, or any others of the creditors of the firm, the vice chancellor was right in not setting aside the assignment as illegal and void.

The case would have been entirely different if copartners, who were insolvent, and unable to pay the debts of the firm, either out of their copartnership effects or of their individual property, had made an assignment of the property of both to pay the individual debt of one of the copartners only. For an insolvent copartner who was unable to pay the debts which the firm owed, would be guilty of a fraud upon the joint creditors if he authorized his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property was liable, at law or in equity. Here, however, it is not even alleged in the bill that the assignors were insolvent at the time of the assignment; though, I believe it appears by the answer, that the proceeds of the whole assigned property proved to be insufficient to pay all their debts.

The decree dismissing the bill of the complainants is therefore not erroneous; and it must be affirmed with costs. And the injunction, which was retained until the decision of the appeal, must be dissolved.

## CHILDS vs. CLARK &amp; COUCH.

An assignment by the lessor, of the rent of leasehold premises, creates such a privity of estate between the assignee and the lessee, that the former may maintain a suit in his own name for the rent which accrues and becomes payable, while such privity of estate exists.

Where a deed of premises is given, subject to a lease thereof for a term of years, previously given by the grantor, and subject to the rights of a person to whom the lessor has assigned his interest in the rents reserved in and by such lease, for a portion of the term—the rights of such assignee appearing upon the face of the deed—such deed is constructive notice to the purchaser of the premises, and also to his assigns, of the rights of the assignee of the rent for such portion of the term; although the assignment of the rent has not been recorded.

And the grantees of such purchaser will take their several interests in the premises as assignees, in law, of the lessee, during that portion of the term; and subject to the rights of the assignee of that portion of the rent; and subject to the payment of the rent, or of their respective portions thereof, which accrues or becomes payable during the times they hold and enjoy the premises as such assignees.

If the conveyance to each purchaser, of a portion of the premises, was for the whole term, the right of action against them, for rent, exists, as to a portion of the rent at least, although some of them are only assignees of undivided interests in the premises.

The privity of estate exists between the landlord and the assignee of the lessee, *pro tanto*, where the lessee only assigns a part of the premises, if such assignment is of his whole interest and estate in that part of the premises.

The distinction between an assignment and an under tenancy depends solely upon the quantity of interest which passes by the assignment, and not upon the extent of the premises transferred thereby.

The assignee of a lease is only liable, as such assignee, for the rent which accrued or became payable, or for other covenants broken, while he was such assignee. And he may discharge himself from all further liability, by assigning his interest in the premises to a stranger, even if the assignee is a beggar; provided he actually relinquishes the possession of the premises, and all interest therein, so that the assignment is not merely colorable, or fraudulent.

There being no privity of contract between the lessor and the assignee of the lease, the latter is personally liable only in respect to his privity of estate in the land, or in respect to covenants running with the land, for the rent which accrued and became payable after such privity of estate commenced, and before it terminated; or while he enjoyed, or had the right to enjoy, the premises or some part thereof, as an assignee of the lease.

A mere mortgagee of the term, who has not entered under his mortgage, is not personally liable, as an assignee of the interest of the lessee in the premises.

Whether the assignees of the lessee's interest in undivided portions of the leasehold premises should be sued jointly for the whole rent, or separately for their respective portions thereof? *Quære.*

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Whether the assignee of a part only of the leasehold premises, but of the whole of the lessee's interest in that part, is liable in law for the whole rent, or for the whole damage for the breach of any of the covenants in the lease which extend to the whole premises? *Quære.*

THIS was an appeal from a decretal order of the vice chancellor of the eighth circuit, overruling the several demurrers of the appellants to the complainant's bill. The facts of the case, as stated in the bill, were substantially as follows:

On the first of November, 1831, Oshea Wilder and his wife held certain lands in the county of Monroe, in trust for the benefit of Mrs. Wilder, and their children, under the will of S. Shaw, deceased; but the nature of the trust, the powers of the trustees, and the time when the trust was created, or when it was to determine, were not stated in the bill. On the day before mentioned, however, Wilder and wife, as such trustees, leased those lands to E. Griffin, for the term of twenty years, from the first of April, 1832, at the yearly rent of \$250, payable semi-annually in advance, to the lessors, their heirs and assigns. This lease was duly acknowledged and recorded in May, 1836. Prior to the first of April, 1833, the lessors assigned to the complainant the rents which should accrue, and all their claim to any benefit under the lease, for seven years, commencing on the last mentioned day; which assignment the bill stated to have been lost. In March, 1836, a law was passed authorizing Wilder and wife to sell and convey the premises, as their own property, and to invest the proceeds thereof in lands in Michigan, upon the same trusts. Under this statute, in July, 1836, Wilder and wife sold and conveyed the premises described in the lease, to W. W. Campbell; excepting from the operation of that conveyance the interest which Griffin had acquired under the lease to him, and also all the estate and interest which T. Childs, the complainant, had acquired by the assignment of the rent to him for seven years from the first of April, 1833. On the first of November, 1836, Campbell conveyed one undivided half of the premises to J. Cleveland; and on the same day Campbell and Cleveland conveyed an undivided quarter thereof to E. Meade, and another undivided quarter to W.

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Couch, one of the defendants in this cause. On the first of May, 1837, Cleveland mortgaged his undivided one fourth of the premises to Couch, to secure the payment of \$4000; and on the 18th of the same month Campbell conveyed his undivided fourth thereof to Cleveland. In November, 1838, Couch conveyed his undivided fourth of the premises to Campbell, and took back a mortgage thereon to secure the payment of \$3420. All of these deeds, assignments, and mortgages, except the assignment to the complainant for the seven years' rent, were duly recorded. And in June, 1839, Campbell, Cleveland and Meade, conveyed all their interests in the premises to G. R. Clark, one of the defendants in this cause. At the time of this last conveyance, the rent, which became payable in advance on the first days of April and November, 1839, was unpaid, and remained due at the time of the filing of the bill in this cause. And the half year's rent, which became due on the first of November, after that conveyance, also remained due and unpaid. At the time of the filing of the complainant's bill, Griffin, the original lessee, was insolvent, and Campbell had also become insolvent, and had been discharged from his debts under the bankrupt act of 1841. But no reason was stated for not making Cleveland and Meade, who were the assignees or grantees, under Campbell, of undivided portions of the premises at the time when a part of the rent assigned to the complainant accrued, parties to this suit.

The defendants put in their several demurrers to the bill, for want of equity; for multifariousness; and for want of parties, because Cleveland and Meade, and Campbell, or his assignee in bankruptcy, were not made defendants.

The vice chancellor, though with considerable hesitation, arrived at the conclusion that the complainant had an equitable lien upon the land for the two years' rent which was still due to him, and that Clark, the then owner of the land, and Couch, who held the mortgages upon two undivided fourths of the land, were properly joined as defendants, and were the only necessary parties. He therefore overruled the demurrers, and directed the defendants to answer the bill within thirty days.



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The following opinion was delivered by the vice chancellor.

F. WHITTLESEY, V. C. This case is not without its embarrassments, as to the legal questions presented. The complainant, by his assignment from Wilder and wife, acquired no estate in the premises, or interest in the reversion, but merely an assignment of the rents, for a certain time which had not yet accrued. As the lease itself was not assigned, it would seem that the complainant would have had no right to distrain in his own name. (*Slocum v. Clark*, 2 Hill, 475.) It would appear, however, that he might sue in his own name, as the rent assigned was not then due; and that he could thus sue either the lessee or his assignee in possession—the covenant to pay rent running with the land. (*Demarest v. Willard*, 8 Cowen, 206. *Willard v. Tillman*, 2 Hill, 274.) He could not, however, sue a mortgagee not in possession. (*Astor v. Miller*, 2 Paige, 68; *S. C. in error*, 5 Wend. 603. *Walton v. Cronly's adm'r*, 14 Id. 63.)

Campbell, when he took the assignment of the lease from Griffin, became an assignee liable to pay rent to the complainant. The case states that he had notice of the complainant's rights; and the assignment to him is expressly to hold under the yearly rents and covenants in the lease mentioned. He was, therefore, not only liable to pay the rent, but liable to pay it to the complainant, by virtue of his knowledge of the assignment to the complainant. When Wilder and wife conveyed to Campbell, such conveyance being of the reversion, would have entitled the grantee to receive the accruing rents upon the outstanding lease. But this very conveyance informed him that the complainant had a right to receive such rents for a part of the time—and the object of this exception, so far as the complainant is concerned, probably was to secure his right to receive the rents for the period mentioned, and to inform the grantee that the complainant was so entitled to receive them to his exclusion as grantee of the reversion.

Rent is an ordinary incident to the reversion, but it may be separated from the reversion—and this instrument may perhaps

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be considered as making such a separation. But in this case, the grantee of the reversion was also the owner of the term—a fact which, from the tenor of the deed, I should infer that the grantor did not know. No one can be both landlord and tenant of the same premises in the same right, though, possibly, Campbell, while he remained in possession, might be considered as tenant of the complainant because of the lease which he took by assignment from Griffin, and because of the recognition of the complainant's right contained in the grant of the reversion. It is doubtful, however, whether the complainant could have sued Campbell for rent after the latter had received the deed of the reversion. If he could, it would be because he was assignee of the lessee, and because the rent had, in a certain sense, been separated from the reversion. If Campbell was liable to be sued for rent as assignee of the lessee, the grantees from Campbell did not, by reason of such grants, become assignees. The merger of the term in the reversion would, I think, then be complete upon the grants from Campbell, if not before, and the effect of such merger would be to impair, and indeed destroy, the right of the complainant to collect the rent due to him from the land; or any occupant of the land. (*Webb v. Russell*, 3 T. R. 393.) In such an aspect of the case, Campbell would have done an act to destroy the complainant's rights, with full knowledge of those rights. He would by his own acts have brought about a merger, cutting off the complainant from a remedy, and which the latter could not prevent. He took the grant of the reversion subject to the rights of the complainant. Those rights were to collect the rent from the land, the lessee and his assignee. They were in a certain sense chargeable upon the land, and as the means of enforcing them, as assignee of the rent, has been taken away or rendered very doubtful by Campbell, the charge should be continued upon the land, and the title go to Campbell and pass to his grantees with this burden. I am not free from doubts as to this conclusion; but it seems to me to be one which meets the equity and substantial justice of the case as it is now presented. I can perceive no ground for objection that the bill is multifarious, or for

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a want of parties. If the bill is merely to enforce a lien, all the necessary parties are before the court.

The demurrers are overruled with costs, with liberty to the defendants to answer in thirty days, or in default, that the bill be taken as confessed.

*D. Cady*, for the appellants. The case made in the complainant's bill does not entitle him to any relief against the defendants. There is no privity of estate or contract between him and them. The rents which accrued in 1838 and in 1839 are not a lien on the land; and if not, the defendants are improperly joined in the cause. If the complainant has a remedy against the persons who had possession of the premises in the years 1838 and 1839, his remedy is not against them jointly, but against each, for the proportion of the rent which accrued on the part of the premises possessed by each. The defendant, George R. Clark, had no interest in or to the premises on the 1st of April, 1838, or on the 1st of April, 1839, when the rent of those years became due: and Couch, the other defendant, was, on the 1st of April, 1838, the owner of only one-fourth of the premises; and on the 1st of April, 1839, he owned no part of the premises, but was a mortgagee of one-fourth.

*F. M. Haight*, for the respondent. By the assignment from Griffin, and the deed from Wilder and wife, Campbell took the estate charged with the payment of the rent due to the complainant. The conveyance by Wilder and wife to Campbell extinguished the covenants in the lease, and left to the complainant an equitable lien for the amount due him. The defendants took the estate with full notice of the claim of the complainant, and must hold in subordination to it. The complainant, as assignee, is entitled to come into a court of equity; his remedy at law in the name of his assignor having been taken away, or rendered doubtful, by the conveyances between the parties.

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THE CHANCELLOR. At the time of the conveyance of the premises, from the lessors, to Campbell, in July, 1836, the complainant was not only the assignee of the rent for seven years from the first of April, 1833, but of all the right and claim of the lessors to any benefit under the lease for the same period of time. It was therefore an assignment of an interest in the land itself as well as in the rent, so far as an interest in the land was necessary to give the assignee all the rights of the original lessors for the recovery of the rent, either by action or distress. And it is settled, both in this state and in England, that an assignment creates such a privity of estate between the assignee and the lessee that the former may maintain a suit in his own name for the rent which accrues and becomes payable while such privity of estate exists. (*Ards v. Watkins*, Cro. Eliz. 637, 651. *Coke Litt.* 215, a. *Allen v. Bryan*, 5 Barn. & Cress. Rep. 512. *Demarest v. Willard*, 8 Cowen's Rep. 206. *Littlewood v. Jackson*, *Idem*, 211. *Willard v. Tillman*, 2 Hill's Rep. 274.) And the complainant, previous to the deed of July, 1836, would have had the same right to bring an action, in his own name, against Campbell as the assignee of Griffin the lessee, for the rent which became payable on the first of April, 1836, after Campbell became such assignee. (*Newcomb v. Harvey*, Carth. 161. *Addison's Law of Cont.* 300. *Gillb. on Rents*, 174.)

Nor was that part of the term out of which the complainant's rent and interest in the land, under the lease and the assignment for the security and recovery of that rent, merged in the fee of the land which was conveyed to Campbell by the deed of the original lessors. For the grantee in that deed had actual notice of the assignment to the complainant; which of itself would have been sufficient, in equity, to prevent a merger of the term during the seven years. But, in addition to this, the right of the complainant, as assignee for the seven years, was expressly excepted and reserved in the deed from the lessors to Campbell. The rights of landlord and tenant did not unite in the same person, therefore, during the residue of the seven years which was then unexpired; so that there was no merger even

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at law. And the right of the complainant to institute an action at law against Campbell, as the assignee of Griffin the lessee, continued the same as it was before the deed of July, 1836, while Campbell continued to possess and enjoy the term under the previous assignment from Griffin.

The rights of the complainant, as the assignee of the interest of the original lessors in the rent of the premises for the seven years, appearing upon the face of the deed to Campbell, under and through which Cleveland, Meade, Couch, and Clark derived their title to the premises, as assignees of the rent and reversion after the seven years, such deed was constructive notice to them of the right of the complainant; although his assignment had not been recorded. They therefore took their several interests in the premises as assignees, in law, of the lessee, during the continuance of the seven years, and subject to the right of the complainant, as assignee of the rent; in the same manner as Campbell held the same previous to his conveyances respectively. They then took those interests subject to the payment of the rent, or of their respective portions thereof, which accrued or became payable during the times they held and enjoyed the premises as such assignees. And as the conveyance to each was for the whole term, in a part of the premises, the right of action against them as assignees existed, as to a portion of the rent at least, although some of them were only assignees of undivided interests in the premises. For the privity of estate exists between the landlord and the assignee of the lessee, pro tanto, where the lessee only assigns a part of the premises, if the assignment is of his whole interest and estate in that part; the distinction between an assignment and an under tenancy, depending solely upon the quantity of interest which passes by the assignment, and not upon the extent of the premises transferred thereby.<sup>(a)</sup> (*Finl. Land. & Ten.* 294. *Conan v. Kemise*, *W. Jones' Rep.* 245. *Stevenson v. Lambard*, *2 East's Rep.* 580. *Brown v. Hore*, *Cro. Eliz.* 633.) Whether a joint action should be brought against all who were charge

(a) See *Van Rensselaer v. Jones*, (2 *Barb. Sup. Court Rep.* 643.)

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able as tenants in common for the rent which accrued while they were assignees of undivided interests in the premises, it is not necessary to decide at this time. In *Merceron v. Dowson*, (5 Barn. & Cress. 479,) in an action against an assignee of the lessee, for a breach of a covenant to repair, the court of king's bench held that the defendant could not plead in bar of the action that he was only assignee of an undivided interest in the premises. But there were doubts expressed by the judges as to the right of the plaintiff to sue one assignee of an undivided portion of the premises alone, and to charge him separately for the whole repairs. And they appear to have been of opinion that the defendant might have pleaded in abatement that he was only a tenant in common with others, as an assignee of an undivided interest in the premises. In the subsequent case of *Curtis v. Spitty*, (1 Hodges' Rep. 153,) in the court of common pleas in England, the assignee of the entire interest of the lessee in a separate parcel of the demised premises, was sued in an action of debt for the whole rent reserved in the lease. And Chief Justice Tindal said it was a very nice and difficult question, not settled by any decision to be found in the books, whether there existed a privity of estate as to the whole land embraced in the lease, by an assignment of part only, so as to authorize the landlord to charge the assignee of that part, in an action of debt, with the rent of the whole land embraced in the original lease. That case however was disposed of upon a question of variance in the pleadings; so that the question as to the liability of the assignee for the whole rent, either in that form of action or in an action of covenant upon the lease, was not disposed of by the court.

It is perfectly well settled, however, that the assignee of a lease is only liable as such assignee for the rent which accrued or became payable, or for other covenants broken, while he was such assignee; and that he may discharge himself from all further liability by assigning his interest in the premises to a stranger, even if the assignee is a beggar; provided he actually relinquishes the possession of the premises and all interest therein, so that the assignment is not merely colorable or fraud

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ulent. For as there is no privity of contract between the lessor and the assignee of the lease, the latter is personally liable only in respect to his privity of estate in the land, or in respect to covenants running with the land, for the rent which accrued and became payable after such privity of estate commenced, and before it terminated; that is, while he enjoyed, or had the right to enjoy, the premises, or some part thereof, as an assignee of the lease. (*Armstrong v. Wheeler*, 9 Cowen's Rep. 88. *Tovey v. Pitcher*, Carth. Rep. 177. *Lekeux v. Nash*, 2 Stran. Rep. 1221. *Taylor v. Shum*, 1 Bos. & Pul. 21.) It is also the settled law of this state, that a mere mortgagee of a term, who has not entered under his mortgage, is not personally liable as an assignee of the interest of the lessee in the premises. (*Astor v. Miller*, 2 Paige's Rep. 68; 5 Wend. Rep. 603, S. C. on appeal.)

It is evident, therefore, that the defendant Clark is not personally liable for any rent which accrued and became payable previous to the conveyance to him, in June, 1839. And Couch is not liable, as assignee, for any rent which accrued and became payable after his conveyance to Campbell, in November, 1838. Clark however, is personally liable to the complainant, either at law or in equity, as the assignee of the whole interest of the lessee, for all of the half year's arrears of rent which became due and payable in November, 1839; which was the only rent that became payable subsequent to the time when he became assignee. And Couch is liable to the complainant for a part, at least, of the two payments which became due on the first of April and on the first of November, 1839; while he was the assignee or owner of one-fourth of the premises. Cleveland and Meade are also liable for a portion, at least, of the three semi-annual payments which became due previous to their conveyance to Clark. And I think the complainant had a perfect remedy at law for the recovery of the several amounts for which the defendants in this suit, and Cleveland and Meade, were thus liable, if he could have proved the execution of the last assignment.

But even if the remedy at law was so doubtful or difficult as

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to authorize the complainant to come into this court for relief, the objection that this bill is multifarious is well taken. For Clark has no interest in, or connection with the part of the rent for which Couch is liable. Nor has the latter any interest in, or connection with, the rent which accrued and became payable after the conveyances of the premises to Clark. The vice chancellor appears to suppose the complainant has an equitable lien upon the *land* in the hands of Clark, for the whole rent which is unpaid. If that was so, Couch, as the mortgagee of two undivided fourth parts of the premises upon which that lien existed, would be a proper party to a bill to subject the land, or the future income thereof, to the payment of the rent. It must be recollected, however, that the whole of the term of seven years, out of and during the continuance of which the complainant's rent was to arise, had expired several years before the filing of the bill in this cause. The only interest which either of these defendants had in the premises, at that time was, in the freehold estate, which had been acquired from the original lessor, under the deed of July, 1836. And the residue of the term originally granted to Griffin, in which the complainant never had any interest under the assignment from the lessors, was actually merged, both at law and in equity, in the absolute fee, which after the expiration of the seven years was vested in the same persons and in the same rights.

The order appealed from must, therefore, be reversed without costs to either party. And the demurrers must be allowed and the bill dismissed with costs; but without prejudice to the rights of the complainant at law, or to proceed by several suits in equity if it shall be deemed proper to institute such suits. As the defendants both appeared by the same solicitor, and their demurrers to the bill are the same in substance, only one bill of costs is to be allowed.



HERCKENRATH and VAN DAMME vs. THE AMERICAN MUTUAL INSURANCE COMPANY and others.

Where a corporation has underwritten a policy, and afterwards causes itself to be reinsured and after the loss of the property insured such corporation becomes insolvent, the person originally insured has no equitable lien, or preferable claim, upon the sum of money due on the contract of reinsurance. But that fund belongs to all the creditors of the insolvent corporation ratably; under the provisions of the revised statutes relative to proceedings against corporations in equity.

The risk which the first insurer had assumed, forms, as between him and the reinsurer, the subject matter of the reinsurance. And such reinsurance is a new contract, entirely distinct from the first, which still subsists in all its force.

From the nature of the contract of reinsurance, and the want of privity between the reinsurer and the person first insured, it does not come within the rule that the principal creditor, in equity, is entitled to the benefit of all counter bonds and collateral securities given by the principal debtor to his surety.

*It seems* that upon a contract of reinsurance the reinsurer is bound to pay the amount which the original insurer becomes legally liable to pay to the assured in consequence of the risk assumed, and not merely the amount which the original insurer actually pays in consequence of the risk assumed by him.

THIS was an application, by The American Mutual Insurance Company, to dissolve an injunction restraining that company from receiving, and The Mutual Safety Insurance Company from paying, the amount due from the last mentioned company upon a policy of reinsurance. The motion was made upon the matter of the bill only.

The American Mutual Insurance Company insured the complainants, \$22,000, upon merchandize and other property in a store in Broad-street in New-York, and afterwards caused itself to be reinsured to the amount of \$10,000, by The Mutual Safety Insurance Company, upon the same risk. During the running of these policies, the property was destroyed by the great fire in Broad-street, in July, 1845. The American Mutual Insurance Company having become insolvent, in consequence of losses occasioned by that fire, the question presented by the bill in this cause was whether the complainants had an equitable lien, or preferable claim, upon the fund of \$10,000, due upon the reinsurance, or whether that fund belonged to all the creditors of the insolvent company ratably?

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*E. Sandford*, for the complainants. The reinsurance of \$10,000, made by the American Mutual Insurance Company with the Mutual Safety Insurance Company, upon the goods of the complainants, should be deemed in equity to have been made in trust for the complainants. It is the property at risk of the original assured that feeds the contract of reinsurance and upon which alone the liability of the reinsurer arises, and the damage upon which forms the measure of his liability. The only benefit an insurance company effecting a reinsurance upon a risk taken by them can legally acquire is from the premium earned before effecting the reinsurance and the difference between the premium received and the premium paid. In this case the difference thus made was five cents on \$100—\$5.

Upon effecting that reinsurance to the amount of \$10,000 upon the goods of the complainants so insured, the American Mutual Insurance Company stood, in equity, in the situation of a surety for the Mutual Safety Insurance Company, to the extent of \$10,000. The Mutual Safety Insurance Company, to the extent of \$10,000, was substituted in the place of the American Mutual Insurance Company, as underwriters against any loss to be sustained by the complainants, and the complainants are entitled, in equity, to enforce the obligation of the Mutual Safety Insurance Company, and compel the payment, by them, of the amount of the complainants' loss, which was assumed by their policy.

The general creditors of the American Mutual Insurance Company have no legal right, nor any equitable title, to a fund created solely by the loss of the complainants' property. As between the complainants and such creditors, the case stands as though the American Mutual Insurance Company had originally insured the complainants in the sum of \$12,000.

The complainants have a lien upon the policy of reinsurance made by the Mutual Safety Insurance Company, which a court of equity will establish and enforce by reason of their interest in the subject matter of that contract. It is the doctrine of a court of equity that an agreement in relation to a subject, binds the subject itself; and the court will interfere to establish a right

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in behalf of the owner of the subject, upon the ground of personal performance.

A privity of contract arose, by implication of law, between the complainants and the Mutual Safety Insurance Company, upon their engaging to indemnify the American Mutual Insurance Company, to the extent of \$10,000, against a loss by fire of the complainants' property. A promise made by B. to C., for the benefit of D., will give D. a right to maintain an action at law upon it.

*B. D. Silliman*, for the Am. Mutual Ins. Co. The complainants have no specific claim to this fund, either as against the reinsurer or the reinsured. They are only entitled to share it *pro rata* with the other creditors of the insolvent company, (through the receivers.) There was no privity, as to the contract of reinsurance, between the complainants and either of the other parties. They had no concern with, and knew nothing of, the reinsurance, which was procured, not to secure the payment to them of their debt, but to protect the assets of the reassured against such loss as they might become *liable* to pay under the first policy of insurance. The reassured did not thereby diminish their liability to the complainants. The premium for the reinsurance was paid out of the common fund pledged for the security of all the creditors, and was paid to protect that fund.

The contract of reinsurance, and the rights and liabilities under it, are well defined, and have been so from a very early period. The rule is that the *reassurer* must pay to the *reassured* (The Am. Ins. Co.) the amount which the latter *has become liable* to pay. It makes no difference that the first insurer has not paid, or will not be able to pay, the insured in full. This rule results from all the authorities in France, England, and this country. (*Emerigon*, tom. 1, 247. *Roccus*, note 12, and the earlier writers cited by *Emerigon* and *Roccus*. *Boulay Paty*, ch. 8, sec. 14, ed. 1827. *Pardessus*, *Droit Commercial*, sec. 593. *Alauzet*, *Traite des Assurances*, vol. 1, p. 152. *Park on Ins.* 276, 280. *Burns*, 59, 60. *Weskett*, 456. *Phillips*, 2, 58. *Condy's Marshall*, 143. 3 *Kent's Com.* 278.)

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The first insured, (the complainants,) have no other or better claim to the reinsurance money than the other creditors of the American Mutual Insurance Co. have to it, but must come in *pro rata* with them. This has been expressly decided in the cases stated by Emerigon, *ut supra*, vol. 1, p. 247, &c. and is held to be the rule by the other writers to whom I have before referred. (See also *Hastie v. Depeyster*, 3 Caines, 190, and note.)

The rule in equity that a creditor is entitled to the benefit of all collateral obligations, *for payment of his debt*, which his debtor acquires, and that the creditor is entitled to the benefit of the securities which the principal debtor has given to his surety, can have no relation to this case. The cases are not parallel, and the reinsurance does not grow out of any relation of suretiship. (*Id.*) The reinsurance is an independent contract, purely personal between the parties making it, and the first insured has no connection with it, or right to it. This is not a case of suretiship, even as between the reinsurer and the reinsured; for the former cannot avail himself of a compromise between the latter and the first insured. Nor can he avail himself of the diminished payment made by the first insurer to his creditor on account of bankruptcy. The principle that a mortgagor may insure his property for his own protection, and recover the amount of his insurance, notwithstanding the mortgage debt remains unpaid, is analogous and applicable to this case. (*Carpenter v. Providence Ins. Co.* 16 Peters, 495, *per Story, J.* at p. 501. *Col. Ins. Co. v. Lawrence*, 10 *Id.* 507, 512. *Rockett v. Carter*, 8 Paige, 437. *Hosack v. Rogers*, 6 *Id.* 427; S. C. 18 Wend. 319.) In England reinsurance is allowed only in case of the death or insolvency of the first insurer. (19th Geo. 2, ch. 37, § 4.) Thus reinsurance is provided for the very case of a bankrupt insurer; and yet not an instance is to be found in the English books where the insured creditor of the bankrupt was held to have any better claim on the reinsurance money than the other creditors. On the contrary, Park, Burns, and Weskett, (as well as Kent cited above,) distinctly intimate that he will come in *pro rata* with them.

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(*Park*, 278, *ch.* 15, *London ed.* 1796. *Burns*, 60, *ch.* 3, *London ed.* 1801. *Weskett*, 456, 457, *Dublin ed.* 1794.)

The complainants claim results from confounding a *reinsurance* with *double insurance*. Mr. Park says, they are often confounded, though nothing is more distinct than the one from the other of them. In double insurance the insured (who has caused both parties to become responsible *to him*) can sue either the first or the second insurer. The complainants had the right to procure for themselves a double insurance and had also a right to procure an insurance of the first insurer's solvency. They did neither. (*Park*. 280. *Christian's note*, 16, *to 2 Bl. Com.* p. 460.)

The complainants' proposition that the reinsured, on receiving the whole amount of the insurance money, become gainers and make a profit by the complainants' loss, unless the latter is paid in full, is erroneous. The reinsured retain nothing. They owe the whole amount of the complainants' loss and of the losses of all other creditors; but their insolvency having intervened, the statute controls the mode of distributing their assets, forbids the payment in full of complainants' claim, and requires a ratable distribution among the creditors. The reinsured has lost the whole amount of the subject matter of the reinsurance. It is none the less a loss because they are unable to pay it in full, and because this risk, (in common with other losses,) has destroyed them.

THE CHANCELLOR. The question presented in this case is one of considerable importance. But as the contract of reinsurance was virtually prohibited in England more than one hundred years since, and before the principles of the law of insurance had been well settled there, nothing is found in the English reports upon this point. And, so far as I have been able to discover, the question has not heretofore arisen before any of the courts of this country for decision. The validity of the contract of reinsurance was early acknowledged among the maritime nations of Europe; being found in the *Guidon*, and also in the marine ordinances of Louis the fourteenth. (*Le Guid.* *ch.* 2, *art.* 19; *Ord. of 1681, tit. Assur. art.* 20.) It is

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expressly authorized by the present commercial codes of France and of Spain. (*French Com. Code*, art. 342. *Com. Code of Spain*, art. 852.) It is also recognized, by our courts, as a valid contract here. (*Hastie & Patrick v. De Peyster & Charlton*, 3 Caines' Ca. 190. *Bowery Fire Insurance Company v. New-York Fire Insurance Company*, 17 Wend. 359.) And I believe it is a species of insurance which is in common use in many of the other states of the union, as well as with us. I have, therefore, considered it proper to examine the question raised by the bill in this case, with considerable care, and to endeavor to arrive at a correct conclusion thereon.

Valin, if he has not confounded a reinsurance of the first insurer, against the risk he has assumed, with what is said in the 20th article of the *Guidon*, as to a reassurance obtained by the person originally insured, against the insolvency of his first insurer, decides the question in favor of the claim of the complainants in this suit. For, in his commentary upon the 20th article of the ordinance of 1681, relative to insurances, he says, the insurer, who procures a reassurance, remains subject to the same obligation to the person previously insured by him, while he causes his own *solvency* to be insured. That the effect of it is, that the person insured has two insurers instead of one, with a perfect right of action directly, and in solido, against each of them; so that he is not obliged to proceed against the first insurer before attacking the second, provided the engagement in solido has been stipulated in the policy of reassurance; otherwise a discussion will be necessary. (2 *Becane's Valin*, b. 3, tit. 6, art. 20, p. 278.) Emerigon, however, is of an entirely different opinion. He says, the *risk* which the first insurer has assumed, forms, as between him and the reinsurer, the subject matter of the reinsurance; which is a new contract, entirely distinct from the first which still subsists in all its force. For that reason, the premium of reinsurance may be greater, or it may be less, than that upon the first insurance. If the premium is less, it is a gain which the first insurer makes; if it is more, it is his loss. It is no concern of the person first insured, who is not brought into this new con-

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tract. And to sustain this position Emerigon refers to Pothier. He says, it follows from this principle that the person first insured cannot sustain a suit upon the reinsurance. To support this principle he cites two decisions of the French commercial courts, in which it was expressly decided that the person originally insured was not entitled to the benefit of the reinsurance in case of the failure of his insurer. The first was decided in 1763; where the first insurer, after having procured himself to be reinsured, became a bankrupt. The subject matter of the first insurance having been lost by the perils insured against, the persons who were originally insured claimed a lien, or a right to a preference in payment, to the extent of their loss, out of the fund produced by the reinsurance. This claim was contested by the general creditors of the bankrupt; and the court rejected the claim of preference made by the persons insured by him. The second case, which arose fifteen or twenty years afterwards, was substantially the same, in all its circumstances, and was decided in the same way. (1 *Emer. Traité des Assur. ch. 8, § 14.*) And to show that the reinsurance is not a contract for the benefit of the person first assured, and merely to indemnify the insurer for what he actually pays upon his own insurance, in case of loss, Emerigon cites a decision by the commercial court at Marseilles, in 1748. There the original insurer failed, and by the compromise, with the assured and his other creditors, the insurer only paid sixty per cent upon the amount of his debts. The reinsurer thereupon claimed the benefit of a deduction, to that extent, upon the policy underwritten by him. But the court held that the reinsurer was bound to pay what the original insurer became *liable* to pay, to the first assured, in consequence of the loss of the subject matter of the first insurance; and not what he had *actually* paid, upon the compromise with his creditors, as an insolvent debtor. And judgment was accordingly given against the reinsurer, for the whole amount of the reinsurance.

*Delvincourt*, a very recent French writer, in his institutes of commercial law, after stating the opinions of Valin and of Emerigon, upon the questions now under consideration, arrives

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at the conclusion that the opinion of Emerigon is in conformity with the true principles of the contract of reinsurance. And that the reinsurance was, as to the first assured, *res inter alios acta*. (2 *Delv. Inst. de Droit Com.* 338.) Persil, Quenault, and Grun & Joliat, modern French writers on the law of life and fire insurances, as well as Pardessus and Alauzet, also state the law on this subject, as laid down by Emerigon, without objection. (*Persil des Assur. Terrest.* 117, art. 92. *Quen. Traité des Assur. Terrest.* 29. *Grun & Joliat, Assur. Terrest. &c.* 189. 1 *Alauz. Traité des Assur.* 277.)

The law on this subject appears to be understood in the same way in Scotland. For Bell, after stating that the insurer has himself an insurable interest, which he may protect by a reinsurance, says: "This transaction, in the event of the original insurer's insolvency, the person originally insured has no interest in, and cannot recover from the last insurer in any other way than in common with the other creditors of the first insurer." (2 *Bell's Law Dict.* 93, art. *Insurance*.) Millar says a reinsurance is a hedging contract, by which the underwriter withdraws himself from all risk; and that an insurance against insolvency is a contrivance by which the assured strengthens his former security. (*Mill. on Ins.* 233.) And Marshall understands the law in England, on this subject, to be the same that it is stated by Emerigon to be in France; although he refers to no English decisions. (1 *Condy's Marsh.* 143.) Judge Livingston also, in the case of *Hastie v. De Peyster*, says there is no privity at all between the person originally insured and the reinsurer. (3 *Caines' Rep.* 196.)

The weight of authority, therefore, is decidedly against Valin upon this question. And from the nature of the contract of reinsurance, and the want of privity between the reinsurer and the person first insured, I think it does not come within the rule, that the principal creditor is, in equity, entitled to the benefit of all counter bonds and collateral securities given by the principal debtor to his surety.

The claim of the complainants, therefore, cannot be sustained;



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and the motion of the defendant, The American Mutual Insurance Company, to dissolve the injunction, must be granted with costs.

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LAWRENCE, executrix, &c. vs. LAWRENCE, administrator, &c.  
and others.

As a general rule, a foreign executor is not entitled to sue in our courts, without having proved the will, and taken out letters testamentary thereon, in the proper probate court of this state.

And where two executors are named in a will, and one of them has taken out letters testamentary in this state and the other has not, the one who has obtained letters here may sue in his own name alone, without naming the other as a party.

These rules, however, are only applicable to suits brought by executors for debts due to the testator, or where the foundation of the suit is based upon some transaction with the testator in his lifetime. They do not prevent a foreign executor from suing in our courts upon a contract made with himself, as such executor.

In such a case the executor with whom the contract is made may sue upon it, in his own name, without proving that letters testamentary were granted to him any where.

Where an executor takes a security in his own name, from his co-executor, for moneys received by the latter as executor, he takes such security merely as a trustee for the persons interested in the estate of the testator.

And where a mortgage is given by husband and wife, as executor and executrix, to their co-executrix, to secure the payment of moneys of the estate received by the husband as executor, the wife, after her husband's death, cannot file a bill, in her character of executrix, against his personal representatives and heirs at law, to foreclose such mortgage; where it does not appear from such bill that she is entitled to a portion of the fund secured by the mortgage, as a legatee, for her sole and separate use.

If, in such a case, the wife had an interest in the fund, and the co-executrix to whom the mortgage was given, upon a proper application to her for that purpose, refuses to proceed to foreclose the mortgage, the widow of the mortgagee, and the other legatees for whose benefit the mortgage was given, may file a bill showing their respective rights in the fund; and claiming to have the benefit of such mortgage, and of a foreclosure thereof.

But in that case the mortgagee, and all the legatees who are interested in the fund, must be made parties to the suit; or the bill must be filed by some of the legatees on behalf of themselves and of all others having an interest in the fund.

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THIS was an appeal from a decree of the vice chancellor of the first circuit, allowing the demurrer of the defendant, J. L. Lawrence, and dismissing the complainant's bill as to him, upon the following state of facts, as presented by the bill :

Abraham Beach, a citizen of New Jersey, the father of the complainant, died in 1828. He left personal property in New Jersey, and some in this state, which was disposed of by his will and codicils ; and the complainant, and other persons not named in the bill in this cause, were entitled to interests in his estate as legatees. Hannah Rattoone, of New Jersey, and the complainant, and her husband, Isaac Lawrence, of the city of New-York, were appointed executrixes and executor. They proved the will and codicils before the proper probate court in the state of New Jersey, soon after the death of the testator ; and letters testamentary were issued to all of them there. In 1839 Isaac Lawrence was indebted to the estate of his father-in-law, for money which he had received as executor. To secure that debt, and such other moneys belonging to the estate as he should thereafter receive, he and his then wife, the complainant, gave their mortgage in fee, to Mrs. Rattoone, the other executrix, upon a lot of land, in the city of New-York, belonging to Isaac Lawrence, and in which the complainant had no interest except her inchoate right of dower. And by this mortgage I. Lawrence covenanted and agreed to pay to Mrs. Rattoone, as one of the executrixes of his father-in-law, the moneys which he had then received, or should thereafter receive, from the estate, with interest, whenever the same should be demanded of him.

I. Lawrence died in 1841, leaving his wife and Mrs. Rattoone surviving him ; he having before that time received moneys from the estate of his father-in-law, to the amount of about \$13,500. But whether any part of that sum belonged to his wife as one of the legatees of her father, or whether she had received her share of the estate before the death of her husband, or what part of the estate she was entitled to, under the will and codicils, did not appear. After the death of I. Lawrence, letters of administration upon his estate were granted

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to the respondent. And all the real estate of the intestate, with the exception of the mortgaged premises, was sold under the order of the surrogate, for the payment of debts; and the proceeds of such sale were brought into the surrogate's office, in New-York, for distribution.

The complainant, after the death of her husband, having applied to the surrogate of New-York and obtained letters testamentary upon the will and codicils of her deceased father, as one of the executrixes named therein, appeared before the surrogate, as such executrix, and claimed the whole amount due from the deceased executor of A. Beach to the estate, and which was secured to Mrs. Rattoone, the co-executrix in New Jersey, by the mortgage executed by the complainant and her husband. The surrogate refused to allow this claim, as a debt chargeable upon the proceeds of the other real estate of the intestate, until the mortgage should have been foreclosed, and the remedy against the mortgaged premises had been exhausted.

The complainant thereupon filed the bill in this cause, in her own name alone, as executrix of the will and codicils of her deceased father, to foreclose the mortgage given to Mrs. Rattoone as her co-executrix in New-Jersey. The administrator and the heirs at law of Isaac Lawrence were made defendants in the suit; but neither Mrs. Rattoone nor the legatees who were interested in the estate of Abraham Beach, were made parties to the bill.

*W. B. Lawrence & D. Lord*, for the appellant.

*David B. Ogden*, for the respondent.

THE CHANCELLOR. If this had been a mortgage to the testator, for a debt due to him, the executrix who had obtained letters testamentary here would, unquestionably, have had the right to file a bill in her own name to foreclose the mortgage; without making her co-executrix, who had only obtained letters testamentary in a sister state, a party. As a general rule, a foreign executor is not entitled to sue in our courts without

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having proved the will and taken out letters testamentary thereon from the proper probate court of this state. And where two executors are named in a will, and one of them has taken out letters testamentary in this state and the other has not, the one who has obtained letters here may sue in his own name alone, without naming the other as a party. (2 R. S. 71, § 15. *Laws of 1838*, p. 103.) These rules, however, are only applicable to suits brought by executors for debts due to the testator, or where the foundation of the suit is based upon some transaction with the testator in his lifetime. And they do not prevent a foreign executor from suing in our courts upon a contract made with him as such executor. For in such a case, the party with whom the contract is made may sue upon it, in his own name, without proving that letters testamentary were granted to him any where. And where a judgment had been recovered in this state, by an administrator appointed here, the supreme court of Massachusetts decided that he could bring a suit upon the judgment in that state, without taking out letters of administration there. (*Talmage, adm'r, v. Chapel*, 16 *Mass. Rep.* 71.) Indeed the court went much farther in that case; for it held that an administrator appointed in that state could not have sued upon the judgment in his own name, as administrator, because there was no privity of contract between him and the plaintiff in the judgment in this state.

In the case under consideration, the mortgage was not given to secure a debt due to the testator, nor to secure a demand due to the complainant and to Mrs. Rattoone as the executrixes of the testator. For I. Lawrence, being himself an executor, owed nothing to them as personal representatives of the testator. The money in his hands belonged to the legatees. And Mrs. Rattoone, in taking a security in her own name, from her co-executor and his wife, took it merely as a trustee for those to whom it rightfully belonged. The complainant, therefore, cannot file a bill, as executrix, to foreclose a mortgage which she and her husband have given to another person. The proper course is for Mrs. Rattoone to file a bill in her own name, to foreclose the mortgage, if any thing is due thereon which I. Law-

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rence was not entitled to retain by virtue of his marital rights as husband of the complainant. And when the amount is collected, it should be paid over to those who are entitled to it under the will of the testator. Or, if the time for the distribution of the fund has not arrived, it should be invested in the joint names of the complainant and of Mrs. Rattoone, as the executrixes to whom letters testamentary were granted in New-Jersey. For it was in the character of an executor, administering the estate of the testator there, that I. Lawrence received the money, for the security of which this mortgage was given.

It does not appear from the bill whether the complainant has any interest in the money for which the bond and mortgage were given. The will and codicils are not set out in the bill, nor is the substance of them stated. And the complainant does not show that she has any interest in the fund as a legatee of her father. The bill only states, in the past tense, that she was a daughter of the testator, and was entitled, by the will and codicils, to a distributory share of his estate, as a legatee. But whether she had received her distributive share of the estate, in the lifetime of her husband, or is now entitled to a portion of the fund, secured by this mortgage, as a legatee thereof for her sole and separate use, is nowhere stated.

If she has an interest in the fund, and Mrs. Rattoone, upon a proper application to her for that purpose, refuses to proceed to foreclose the mortgage for the benefit of the legatees who are interested therein, the complainant and the other legatees may file a bill, showing their respective rights in the fund, and claiming to have the benefit of the mortgage and of a foreclosure thereof. But in that case, Mrs. Rattoone, the mortgagee, and all the legatees who are interested in the fund, must be made parties to the suit; or the bill must be filed by some of the legatees in behalf of themselves and of all others having an interest in the fund. In her character of executrix of her father, and upon the letters testamentary granted to her in this state, however, Mrs. Lawrence does not appear to have any claim upon the moneys received by her deceased husband, and secured by this mortgage. Nor was she, in that character, en

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titled to any part of the proceeds of the real estate which were brought into the office of the surrogate for distribution.

The decree appealed from is not erroneous; and it must be affirmed with costs.

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 CRAIG and STRONG, executors, &c. vs. CRAIG and others.

[Followed, 26 Hun 95. Distinguished, 14 Vr. (N. J.) 47.]

Where a testator, desiring to make a certain provision for his son, which would give him a sure and ample support during his life, by his will directed his executors to invest in bonds and mortgages, and in New-York state stocks, a sum of money sufficient to produce, *in legal interest*, at least \$500 per annum, to be held by such executors in trust for the legatee, and such income to be used by them, in his support and maintenance; such investment to be made, as near as conveniently might be, in equal sums, in bonds and mortgages, and in New-York state stocks; *Held* that the investment should be so made, by the executors, as to raise the full sum of \$500 annually; that the testator did not intend that his executors should invest a capital which, at seven per cent interest, would produce \$500 annually, but an amount sufficient to produce at least \$500, in legal interest or income, at the rates at which such capital could be kept invested during the probable continuance of the life of his son; and that in making the investments upon bonds and mortgages the executors were authorized to invest such a sum as would, at six per cent, produce \$250 annually.

*Held also*, that as to the other half of the investment, directed to be made in public stocks of the state, the executors had no discretion, so long as there were any such stocks to be purchased at par, whatever might be the annual income therefrom; and that in making the first investment, the executors were authorized to purchase, above par, five per cent stock enough to produce an income of \$250, annually, if they could not get it at par. But that after having once made such investment in stocks, the executors would not be authorized to diminish the capital of the fund invested, by purchasing other stock at a rate beyond its par value, in case the first stock should be paid off.

Trusts for accumulation, being prohibited by statute, except for the benefit of minors, a trust to accumulate the rents and profits of real estate, or the interest or income of personal estate, cannot be created for the benefit of a lunatic who is not a minor. But where an annuity is given absolutely to a lunatic, a court of equity may direct the surplus, beyond what is necessary for his support, to be paid over to his committee, and invested for his use.

Where the income of a lunatic is more than can be properly expended for his use it must, as a matter of necessity, be accumulated for him, or for those who may

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eventually be entitled to his property, as his next of kin. But that is not a trust for accumulation which is prohibited by the statute.

Where there is a limitation over, not only of the capital of a fund directed to be invested for the purpose of paying an annuity for life, but of so much of the proceeds thereof as shall remain at the decease of the annuitant, there is an implied direction to accumulate the surplus income of the capital, by the executors, in trust for adults, or for persons not *in esse* at the time the accumulation is directed to commence; which direction to accumulate is void by the provisions of the revised statutes.

Where there is a devise of the income and avails of property to a person, for life, without any devise or bequest to the executors as trustees of such property, the legatee will take a legal estate in such property, if there is nothing else in the will to show that the testator intended to create a valid trust of the estate for his benefit. For a devise of the rents and profits of land for life, without any thing more, is but another mode of making a devise of the land itself, during the same period.

But where the will clearly shows that the testator intended a legatee should receive the rents and profits of the real estate embraced in one share of his property, as well as the income of the personal estate included therein, through the medium of his executors, the executors take the legal title to that share of the real estate during the continuance of the beneficial interest of the legatee therein, as trustees, by implication; to enable them to rent the premises, and to receive the rents and profits thereof, and pay them over to the legatee, or apply them to his use.

Where a testator, by his will, gives no authority to his executors to sell his real estate, the executors cannot sell any portion thereof, either for the purposes of division or otherwise.

But where an express power in trust is given to executors to divide a specified part of the real and personal estate of the testator into four equal parts, and to invest two of the shares for the benefit of two of his children, this is a valid and imperative power in trust, under the provisions of the revised statutes, to divide such real estate into four equal parts, by a valid and legal instrument setting off the share of each devisee in severalty, under the will.

Where a portion of the trusts of a will can be so far severed from the general trust committed to the executors, as to be capable of being vested in different persons, the court, upon sufficient cause shown, and on the giving of proper security to protect the rights of the *cestuis que trust*, may accept the resignation of the trustees appointed by the will, as to those particular trusts, and appoint others in their places.

A residuary devise of real or personal estate, carries with it not only the property of the testator in which no interest is devised or bequeathed by other parts of the will, but also all reversionary and contingent interests in the property, which, in events contemplated by the testator, are not otherwise disposed of.

Where trustees under a will have accepted the trust and have received a legacy given upon the condition that they should execute such trust, the court will not discharge them from the trust without good and sufficient cause be shown.

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Where an annuity is given by a will, and there is no direction as to the time when it shall commence, it commences at the testator's death.

Where stocks are conveyed to the husband and his wife jointly, and she outlives her husband, who dies without having disposed of the stocks, the wife takes the whole by survivorship.

An absolute delivery, and a continued change of possession, are essential requisites of a good *donatio mortis causa*.

The promissory note of the donor is not a good gift *inter vivos*; and the donor, or his representatives, may impeach such a note for want of consideration.

The promissory note of the donor is not a valid gift *mortis causa*.

But it seems that the draft of the donor, in favor of another, may operate as an appointment, or appropriation, of the fund upon which it is drawn, to the use of the donee.

*Wright v. Wright*, (1 Cowen, 598,) commented upon, and overruled.

The case of *James v. James*, (4 Paige, 117,) commented on, and explained.

THE bill in this cause was filed by the executors of Archibald Craig, deceased, to obtain a judicial construction of the will of their testator, in various particulars; and for directions as to the manner of investing and distributing his estate, under the provisions of the will. The testator made his will in June, 1845, and died about a year afterwards, leaving a second wife surviving him. He also left one daughter by his first wife, and three sons and one daughter by his last wife, his only heirs. At the time of making the will, and at his death, his oldest son and his two daughters were married, and his second son was a lunatic. He owned a large estate, consisting of real and personal property; and there was also stock standing in the joint names of himself and wife, which she claimed as her separate property, and she had also real estate which had been conveyed to a trustee for her use.

By his will, after making provision for the payment of his debts, and giving some small legacies to collateral relatives, the testator disposed of the residue of his estate as follows:

"*Fifth*. It being my desire that a certain provision be made for my son John (the lunatic,) which will give him a sure and ample support during his life, I therefore order and direct that my executors, before any distribution of my estate be made, invest in bonds and mortgages, and in New-York state stocks, a sum of money sufficient to produce, *in legal interest*, at least:



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five hundred dollars per annum, to be held by my executors in trust for my said son John ; which income, or so much thereof as may be necessary, I direct to be used by my executors, and the survivor or survivors of them, in his support and maintenance. Such investment I direct to be made, as near as conveniently may be, in equal sums, in bonds and mortgages and in New-York state stocks ; the bonds and mortgages to be taken on unincumbered productive real estate within this state, worth, exclusive of buildings thereon, at least double the sum so invested. The principal so invested, or so much thereof and of the proceeds thereof as may remain, at the decease of my said son, unexpended, I give, devise and bequeath to the legal issue of my said son ; and in case he leaves no issue, then I give, devise and bequeath the same to my four children, James R. Craig, La Rue Craig, Elizabeth C. wife of Julius Rhoades, and Gertrude, wife of John T. Hudson, and to their respective heirs and assigns forever, share and share alike.

*Sixth.* I give, devise and bequeath to my wife, Anna Maria Craig, the use and occupation of my present dwelling house, lot and premises connected therewith, in the city of Schenectady, together with all and singular the out-buildings and appurtenances thereunto belonging, during her natural life. I also give to her an annuity of \$1600 per year, to be paid to her in semi-annual payments ; the principal of such annuity to be invested in such manner as she may reasonably require. I also give to her my family coach or carriage, my two-horse pleasure sleigh, and such carriage horses, harness, and other carriage appendages as I may die possessed of, and all my household furniture. The several devises and bequests unto my said wife are given for her use, in lieu of any right of dower and other claim which she may have upon any part of my estate, and to take effect upon her executing to my executors a release of her right of dower or other claim, when requested so to do by the persons interested therein.

*Seventh.* My son James R. Craig, having for several years past occupied and improved that portion of my real estate which is situated at and near the aqueduct, containing between three

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and four hundred acres of land, and being desirous that he should receive the title to those lands upon terms which I deem reasonable and just, I hereby give, devise and bequeath unto him in fee the lands aforesaid, upon condition, however, that he shall pay, in consideration thereof, to my executors, for the same, \$6000, within five years after my decease, without interest; which sum, when paid, to be regarded as part of my estate, and to be equally divided between my children, Elizabeth, Gertrude, James R. and La Rue, or to their legal representatives. It being expressly understood that my said son James is to make no charge against me or my estate, for any services rendered or any expenditure made on the said lands; nor is he to be charged any rent for the use and occupation of the same.

*Eighth.* I order and direct that my executors, in taking an inventory of the rest and residue of my estate real and personal, not herein before devised, bequeathed and disposed of, shall charge my son James R. with the sum of \$9000, my daughter Elizabeth with the sum of \$8000, my daughter Gertrude with \$6000, and my son La Rue with the sum of \$6000, each being the amounts, as nearly as I can ascertain the same, which I have already advanced to them respectively; and that the aggregate of such real and personal property be divided into four equal shares.

*Ninth.* I give, devise, and bequeath one of those equal shares or parts lastly above mentioned to my son James R. Craig, and to his heirs and assigns forever; but the sum of \$9000, advanced to him, is first to be deducted from his said share or part, before any payment is made to him, and my estate credited for that sum.

*Tenth.* I give, devise, and bequeath one other of those equal shares or parts to my son La Rue Craig, in fee; but the sum of \$6000, advanced to him, is first to be deducted from his said share, before any payment is made to him, and my estate credited with that sum.

*Eleventh.* I give and bequeath to my daughter Gertrude, wife of John T. Hudson, the *income and avails* of one other

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of the said equal shares or parts before mentioned ; the said avails and income to be paid to her, by my executors, *annually*, during her natural life ; and upon her death, I give, devise, and bequeath such equal share or part to the heirs at law of the said Gertrude, and to their heirs and assigns forever ; but the \$6000, so advanced to her, is to be deducted from such share, before any payments are made thereon, and my estate credited with that sum.

*Twelfth.* I give, devise, and bequeath to my daughter Elizabeth, wife of J. Rhoades, the remaining equal share or part before mentioned ; the *avails and income* to be paid to the said Elizabeth, by my executors, during her natural life ; and upon her death, I give, devise, and bequeath such equal share or part to the heirs at law of the said Elizabeth, and to their heirs and assigns forever ; but the \$8000, so advanced to her, is to be deducted from such share, before any payments are made thereon, and my estate credited with that sum.

*Thirteenth.* It is my wish, and I so order and direct, that the portion of my estate mentioned in the eighth article of this instrument be divided as soon as the same conveniently can be, and the shares of my sons James and La Rue be delivered to them respectively, and the shares of my daughters be invested for their benefit respectively, by my executors ; but before effecting this division, it is my desire that my executors sell my lot of ground, situate on the corner of Main and Tupper-streets in the city of Buffalo, and also the lot called the Mill pasture and canal stable in the city of Schenectady ; and for that purpose, they are hereby empowered to execute the necessary title deeds to convey the same to purchasers.

*Fourteenth.* It is my wish, and I so order and direct, that my four children, James R., La Rue, Elizabeth and Gertrude, and their respective heirs, shall at all times share equally in the division of all the property which I own in my own right, as well as the property the fee and title of which is in my wife ; but being advised, that in case my said wife, at her decease, should leave the property, the fee of which is in her, undisposed of, that the title to the same would pass to her children, exclu

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ding my daughter Elizabeth : with the view, therefore, of equalizing such property, in every contingency, among my four children, James R., La Rue, Elizabeth and Gertrude ; and in case my said wife, in her lifetime, shall fail to give, devise, or divide such property, the title of which is in her, in equal shares or portions to and among such four children, then, and in such case, I give, devise and bequeath the real estate before devised for life to my said wife, and also the principal of the said annuity of \$1600 so invested for my said wife, to my executors, in trust, for the benefit of my said children or child as may not receive an equal share of said estate of my wife, so far as to make such child or children equal to the largest share that may be received by either of them from the estate of my said wife ; and that the residue, after such equalization, be divided equally between such four children and their legal representatives, share and share alike ; it being the express intention of this instrument to make the shares of the said Elizabeth, James, La Rue and Gertrude, in the estate left by me, and in the property so owned by my said wife, in all respects equal.

*Fifteenth.* It being my wish and desire that my son John Craig should be amply provided for, I hereby order and direct, that in case my said son should recover, and become of sound mind and capable of taking care of himself, my other children shall each pay over to him, out of the shares of my property bequeathed to them respectively in and by this instrument, the sum of \$2000, making \$8000 in all ; this sum to be given to him in addition to the annuity of \$500 herein before bequeathed to him."

The testator appointed his wife executrix, and the complainants James R. Craig and John Strong the executors of his will and gave to Strong a legacy of \$500, in addition to legal commissions, upon condition that he accepted and executed the trust of executor. The executrix renounced the trust ; but the executors proved the will, and took out letters testamentary thereon. And the widow elected to take the provision made for her by the will, in lieu of dower and other claims upon the estate of the testator, and released her right of dower, in con-

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formity with the directions of the will on that subject. At the time of filing the complainants' bill, Mrs. Rhoades had two children and Mrs. Hudson one, who were made defendants; and who, being minors, appeared and put in answers by their guardians *ad litem*. John Craig, the lunatic, also appeared by his guardian *ad litem*, and put in a general answer. The cause was heard upon bill and answer as to the adult defendants; and upon the bill, answer and master's report, as to the minors. And at the hearing, J. Rhoades and wife, John T. Hudson and wife, James R. Craig and La Rue Craig entered into a written stipulation, authorizing the executors to retain \$2000 from the share of each of the children of the testator, except John, before a division between them under the eighth and ninth clauses of the will, and to invest the same in such manner as the court should from time to time direct, to provide for the contingency of the recovery of John Craig as contemplated by the testator in the fifteenth clause of his will.

A. C. Paige, for the complainants, the executors, for Mrs. Craig the widow of the testator, and for La Rue Craig. The complainants ask for a judicial construction and decision upon the parts and particulars of the will of the testator, specified in their bill of complaint; and also upon such other parts of said will as may appear to be doubtful or obscure; and they ask for such directions in respect to the execution of the said will, and particularly in reference to the doubtful, obscure, or ambiguous parts thereof, as may be necessary to guide and protect them in the discharge of their duty. The complainants also ask for a decision of the question whether the acts of the testator, stated in the bill, constituted a reduction to possession of the stocks and personal property of Mrs. Craig, so as to make the same parts of the testator's personal estate. The complainants ask especially for the decision of the questions stated in the seventh particular of the bill, and particularly whether they can make a division of the residue of the testator's real and personal estate, as directed by the 8th and 13th clauses of the will, as executors or as trustees; or whether

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the same can be made before Mrs. Craig shall have given or devised her property among the four children of the testator; or if made before, whether such division will be absolute or contingent on Mrs. Craig's compliance with the 14th clause of the will; and if such division will be contingent, whether the income of the shares of Mrs. Hudson and of Mrs. Rhoades is to be applied as directed in the 11th and 12th clauses of the will, until it be ascertained whether the disposition specified in the 14th clause has been made. The complainants especially submit the question, for the decision of the chancellor, whether a valid trust is created by the will to receive the income of two fourths of the residue of the real and personal estate of the testator, and to apply the same to the use of Mrs. Rhoades and of Mrs. Hudson respectively during their lives. And if no valid trust is created by said will, and if there is a failure to dispose of the two-fourth parts of the residue of said estate, intended for Mrs. Rhoades and Mrs. Hudson, how such failure affects the other provisions of the will. The complainants also especially ask for the decision of the question, whether they are authorized to sell any part of the real estate, other than that mentioned in the 13th clause of the will, for the purpose of dividing the proceeds of the sale between the four children; or whether they are authorized to lease such real estate, or to receive the rents thereof and to pay the same over to the said four children. The complainants also ask the chancellor to decide whether they are appointed trustees, by said will, of the shares of the testator's estate devised to Mrs. Rhoades and to Mrs. Hudson, and to their heirs. And if it shall be decided that they are trustees of such shares, then they ask permission to resign such trust. The complainants also ask for a decision whether they are authorized by the will, in making the division directed by the will, to divide any part of the real estate among the four children. And they ask for all necessary directions as to the division of the said residue of the real and personal estate among the devisees and legatees, or as to the sale of the same, or of any part thereof, and the division of the proceeds thereof among such devisees and legatees; and generally, that all

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such other directions may be given as the circumstances of this case may require; and that the accounts of the complainants as executors may at all proper times be taken and passed under the order of this court.

*J. C. Spencer*, for J. Rhoades and wife, and for J. T. Hudson and wife. It was the intent of the testator that five hundred dollars *absolutely*, should be raised annually for the support of his son John. The executors should invest in five per cent state stock, enough to produce two hundred and fifty dollars annually. The devisees are not bound to supply any deficiency in the fund, if there should be any. The executors may reserve the surplus of one year for the accidents of another, and are to invest it. No part of any excess during a year should be distributed during the life of John. The principal sum invested to produce the annuity for John, is disposed of by the 5th clause of the will, and is not subject to division under the 8th clause, and is not affected by the 11th and 12th clauses. We suppose all the land which the testator had used as *premises* connected with the lot, passed to Mrs. Craig, and all the out-buildings Mrs. Craig is to direct in what securities the investment for her is to be made; and the fund will be at her risk. The shares of the \$6000 to be paid by James R. Craig, are given absolutely to the four children of the testator, and form no part of "the residue" referred to in the 8th clause, and are not subject to the 11th and 12th clauses, but should be paid over at once to all the legatees. The remainder in fee in the premises devised to Mrs. Craig for life, and in the principal sum invested for her annuity, is devised by the 8th clause to the four children. The property is to be divided by the executors as such. This is a *mere power*. All the property, excepting the principal of John's annuity, the \$6000 to be paid by James R. Craig, and that devised to Mrs. Craig, or invested for her, is to be *immediately* divided. The property devised to Mrs. Craig, and invested for her, is to be divided upon her death, by the executors, according to the 14th clause. By the devise of the avails and income of one fourth of the real estate to Mrs

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Rhoades and Mrs. Hudson, an absolute estate is vested in them for life, in the lands. The income of the personal estate is to be paid over to Mrs. Rhoades and Mrs. Hudson by the executors, as such; and they have no estate as *trustees*. In case of death, resignation, &c. the duty is to be performed by the administrator with the will annexed; and the personal estate is to be invested by them as *executors*. The avails and income thus devised, are not separate estates for the wives, but interests which the husbands may reduce to possession. But the husbands offer and agree that the decree be entered to pay over on the receipts of the wives. Mrs. Rhoades and Mrs. Hudson take only life interests. The fee is expressly devised over. The executors have no power to sell the real estate, unless it is necessary for the purpose of division. The charge of \$2000, in the event of John's recovery, is upon the devisees *personally*, and not upon the real estate devised. No deduction should be made in the division of it on that account; nor should any thing be retained by the executors for the purpose of paying that charge. No security is necessary or required by the will to be given by the devisees. But if John should be in the same situation when the tenants for life die, the court will probably direct sufficient to be retained by the executors; instead of paying it to the devisees in fee.

*A. L. Linn*, for John Craig, the lunatic legatee. The two clauses in the will of the testator which regard the defendant John Craig, to wit, the fifth and fifteenth, are founded upon the express wish of the testator, not only to "*give him a sure and ample support during his life*," but with the manifest intention of making provision for him in the event of his having legal issue, or becoming of sound mind. And as the only reason appearing on the face of the will, why the testator withheld from this son his full share of the estate is his *unsoundness of mind*, and as the provisions made for him in any event fall far short of his full share, they ought not to be burthened with limitations and restrictions, but should be benignly and liberally construed in his behalf. The provision made for this



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defendant, by the 5th clause of the will, entitles him to have invested, before any distribution of the estate of the testator, a sum sufficient to produce in legal interest at least \$500 per annum. This defendant is entitled to have this investment made, in the language of the will, "*as near as conveniently may be in equal sums in bonds and mortgages and in New-York state stocks ;*" that both as it respects the security of the investment and the interest therein, to which his *legal issue*, should he have any, will be entitled, this direction of the will should be observed so far as practicable. The trust created in favor of this defendant by the 5th clause of the will was intended, by the testator, to secure to the use of this defendant not only the annual sum of \$500, but such annual sum to grow out of the particular funds specified. And no obscurity occurs from the use of the words *legal interest* ; nor can they in any event reduce the annual income of \$500, to which this defendant is entitled. These words *legal interest* regard the rate of interest, which both the state stocks and bonds and mortgages, procured for the purposes of such investment, shall legally bear—the stocks by the law of the state which created them—the bonds and mortgages by the contract between the executors and mortgagor. The trust created in favor of this defendant, by the 5th clause of the will, was intended to secure to him absolutely the annual sum of \$500 ; whether such sum be necessary for his support and maintenance or not. And the principal out of which such annuity is to grow, as well as all increases in value of such principal, and surpluses of the income thereof, and the accumulations thereof arising from the investment of such surpluses, if any, is a fund sacred to the uses of this defendant and his legal issue, if any, who shall him survive. It will become the duty of the executors, as the trustees of the fund directed to be created for this defendant, to invest from time to time such portion of the annual proceeds thereof as shall not be applied to the support and maintenance of this defendant. As to the mode in which the provision made for the defendant by the 15th clause of the will, whereby, in the event of his becoming of sound mind, the sum of \$8000 is to be paid to him by the

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other children of the testator, shall be secured, his guardian submits to the direction of the court. It is insisted, however, that whatever may be the construction given to the bequest, made in the will, to the complainant James R. Craig and the defendant La Rue Craig, or to the trusts created for the benefit of the defendants Elizabeth C. Rhoades and Gertrude Hudson, the sum directed to be paid to this defendant by the 15th clause should either be withheld from division and distribution, among those entitled in case the event contemplated in said clause shall not happen, or before such division and distribution it should be properly secured to this defendant.

*J. V. L. Pruyn*, for the children of Mrs. Rhoades, and of Mrs. Hudson. The will creates, if not in terms, then clearly by implication, a valid trust estate in one of the shares of the testator's residuary estate, for the benefit of his daughter Mrs. Rhoades, and her heirs at law. The intention of the testator to preserve the capital of this part of his estate and to give to Mrs. Rhoades the benefit of the income only, with remainder to her heirs at law, is distinctly declared in the 12th and 13th sections of the will. And no ambiguous or doubtful language used in other parts thereof, will be permitted to overrule the testator's clearly expressed views on this point. It is manifestly to be implied from the will, that the executors are to act as trustees for the fund. They are, at any rate, to act as such so far as the personal estate is concerned. Under the 8th section, they have power to divide the estate. In the 12th section, they are directed to pay the income and avails of the share to Mrs. Rhoades, and by the 13th section they are to invest the share. But if the court should be of opinion that the executors were not constituted trustees by the testator, it will not permit his intentions to fail, but will appoint trustees to execute the trust. If, however, the share of the estate referred to was not devised in trust, then a valid power in trust is vested in the executors, under the will, in favor of the heirs at law of Mrs. Rhoades, which this court will require them to execute. Or, if no such power exists

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under the will, then its provisions, in regard to the said share, contain valid directions for the disposition of the same, which the court will require the executors to carry into effect on their part. By these directions, if they are such, a life estate vests in Mrs. Rhoades in one of the residuary shares, with remainder to her heirs at law. In case the court shall be of opinion that under the will Mrs. Rhoades took an absolute estate in the one fourth part of the testator's residuary estate, then, under the offer in the answer of Mr. and Mrs. Rhoades, a proper settlement of her share of the estate should be made, under the direction of the court, so as to protect and preserve the capital thereof for the benefit of her children and heirs at law, as originally contemplated by the testator. The capital of the fund which may be set apart to secure the annuity to John Craig and the amount of \$6000 to be paid by James R. Craig under the 6th section of the will, and also the amount to be set apart to secure the annuity to Mrs. Craig, and the house and lot in Schenectady devised to her for life, subject to the execution of the power as to the two latter, contained in the 14th clause of the will, on the happening of the contingency therein mentioned, form part of the residuary estate of the testator disposed of in the 8th section of the will, and the one fourth part of which was devised in trust as aforesaid, for the benefit of Mrs. Rhoades and her heirs at law.

THE CHANCELLOR. The first question upon which the court is asked to give a judicial construction of the will in this case, is as to the investment for the purpose of raising an income for the support of the lunatic son of the testator. In this question the children of Mrs. Rhoades and Mrs. Hudson, as well as their parents and the lunatic, have an interest. For the capital of this investment is carved out of the general residuary estate of the testator, in which residuary estate the interests of the parties will be different from what they are in the capital of the fund thus carved out of the same. For in the general residuary estate Mrs. Rhoades and Mrs. Hudson have but life interests; and the remainder in fee is limited to their

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heirs at law. But the capital of the fund which is to produce the annuity for the support of the lunatic, is given absolutely to his brothers and sisters, in case he dies without leaving issue, and the heirs at law of Mrs. Rhoades and Mrs. Hudson have no interest therein as remaindermen. The investment must therefore be made so that no injustice shall be done as between the ultimate owners of the general residuary estate or interests therein and the ultimate owners of the capital of this particular fund. But the rights of the lunatic, under the will, must at the same time be preserved. And I think his guardian *ad litem* is right in supposing that the investment must be so made as to raise the full sum of \$500, annually. The testator, as a man of business, well knew that state stocks bearing an interest of seven per cent and having any considerable time to run, could not be purchased at par. He also knew that permanent investments upon bonds and mortgages, on such property as he directed these investments to be made in, could not be made to produce a clear and permanent interest of seven per cent. And yet he uses language, not only in the fifth but also in the fifteenth clauses of his will, showing clearly his intent to leave an undiminished income of \$500, annually, for the support of his unfortunate child. He did not, therefore, intend that his executors should invest a capital which, at seven per cent interest, would produce \$500 annually; but an amount sufficient to produce at least \$500 in legal interest or income, at the rates at which such capital could be kept invested during the probable continuance of the life of his son. The expression "at least \$500," shows that he intended to allow his executors a proper discretion in this respect; so that the income of \$500 should not be diminished in any probable contingency which might happen. In making the investments upon bonds and mortgages, therefore, the executors are to be authorized to invest such a sum as will, at six per cent, produce \$250 annually. That is the rate fixed by the rules of the court, in the computation of the value of life annuities, and is as much income as can safely be calculated on from such an investment, which is to be made from time to time for life. As the testator has di-

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rected the other half of the investment to be made in public stocks of the state, the executors have no discretion upon that subject so long as there are any such stocks to be purchased at par, whatever may be the amount of the annual income of such stocks.' And in making the first investment the executors are authorized to purchase above par, stock enough to produce an income of \$250, annually, if they cannot get it at par. After that, however, they will not be authorized to diminish the capital of the fund by purchasing stock at a rate beyond its par value; and they ought not then to diminish the income by purchasing stock bearing a low rate of interest. And if the rights of both parties cannot be protected in continuing the investment in stock, the executors may then invest that half of the fund in such bonds and mortgages as the testator has mentioned in his will. Under the provisions of the new constitution limiting the powers to contract state debts, and state stocks being wanted for the purposes of the general banking law, it is hardly probable that state stocks can be obtained at par or under, at a rate of interest above five per cent. The executors are therefore to be authorized to invest in five per cents which have the longest time to run, sufficient to raise an annual income of \$250, for the support of the lunatic; and to keep the capital invested in stocks at the same rate of interest, if they can be procured, during his life.

As the capital of the general residuary estate is to be distributed immediately, no provision can be made to supply any deficiency either in this fund or in that provided for raising the annuity of \$1600 for the use of the widow. In making both of these investments, therefore, the executors must see that a sufficient sum is invested to raise the annuity, and to reinvest the capital from time to time without diminishing the capital or the income thereof. In relation to both, the executors, as trustees of those who may ultimately be entitled to the capital of the fund, must see that it is safely invested. But in relation to the last mentioned fund, the widow also, by the terms of the will, has a right to be consulted as to the mode of investment, so as to render it safe for her. She has no right, however, to

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direct a mode of investment which will render the capital un-  
safe for those to whom it may ultimately belong.

The better course for all parties, probably, is to invest upon  
bond and mortgage a sufficient amount of capital to produce  
\$1600 annually, at the rate of six per cent; as it cannot prob-  
ably be made to produce more than at that rate during the whole  
period of the widow's life. In case it should produce more, the  
surplus will belong to the four children of the testator among  
whom the residuary estate is to be divided; as the persons who  
are now presumptively entitled to the next eventual estate in  
the capital of that special fund. The executors, with the as-  
sent of Mrs. Craig, are therefore to be authorized to invest the  
capital necessary to raise her annuity of \$1600 in that manner.  
And if there should be any income from the investment, by  
reason of a temporary investment at a higher rate of interest  
than six per cent, the executors are to distribute the same  
among those who are then presumptively entitled to the next  
eventual estate in the capital of the fund.

The executors are only authorized to use so much of the  
annual sum of \$500 as may be necessary for the support and  
maintenance of the lunatic. And the court is called upon to  
decide what is to be done with the surplus, if the annuity is  
more than sufficient for his support. Trusts for accumulation  
are prohibited, except for the benefit of minors. (1 R. S. 726,  
§§ 36, 37. *Idem*, 773, §§ 3, 4.) A trust to accumulate the  
rents and profits of real estate, or the interest or income of per-  
sonal estate cannot, therefore, be created for the benefit of a  
lunatic. But if this annuity had been given absolutely to the  
lunatic, the court might have directed the surplus, beyond what  
was necessary for his support, to be paid over to his committee,  
and to be invested for his use. For where the income of a lu-  
natic is more than can be properly expended for his use, it must,  
as a matter of necessity, be accumulated for him, or those who  
may be entitled to his property eventually, as his next of kin.  
That, however, is not a trust for accumulation prohibited by  
the statute. If this annuity was given absolutely to the luna-  
tic, therefore, the court would give the proper directions to some

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one to invest the surplus for his benefit. It is evident, however, that the testator did not intend to give to the lunatic any more of the annual income of the fund invested than was necessary for his support and maintenance. For there is a limitation over, not only of the capital of the fund invested, but of so much of the proceeds thereof as shall remain at the decease of the lunatic. This is an implied direction to accumulate the surplus income of this capital, by the executors, in trust for adults, or for persons not *in esse* at the time the accumulation is directed to commence; and is void by the provisions of the revised statutes. There is, therefore, a suspense of the absolute ownership of the capital of the fund, for the life of the lunatic, during which time this part of the income of that fund, not wanted for his support, is undisposed of. And no valid direction for its accumulation being given, it belongs to the brothers and sisters of the lunatic, under the provisions of the revised statutes on that subject, as the persons who are presumptively entitled to the next eventual estate in the capital of the fund. (1 *R. S.* 626, § 40. *Idem*, 773, § 2.) A mere temporary surplus for a single year, owing to some peculiar circumstances, which may be all expended, in addition to the whole annuity, the succeeding year, would not be deemed an accumulation within the meaning of the statute. But if there is a permanent surplus, or if any surplus is likely to remain permanently on hand because it is not wanted for the support of the lunatic, it must be distributed among those who were presumptively entitled to the capital of the fund out of which such surplus income arose, when the same accrued.

In reference to the third question raised by the bill, it is only necessary to say there is no trust as to the shares of Mrs. Rhoades and Mrs. Hudson in the annuity fund of their brother, after the death of the lunatic without issue; but upon the happening of that event, they will be entitled to their shares of the fund absolutely, and the executors may pay it over to their husbands with safety. Their interests in the \$6000 which their brother James R. is to pay for the farm, are also absolute interests. And upon the facts stated in the bill, and admitted in the answers of the adult

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defendants, no one can doubt that the devise of the homestead to the widow for life, and the limitations in fee in the same property after her death, embrace not only the dwelling house, but also the whole of the three lots described in the bill, with the warehouse, office, and other out-buildings thereon ; as the same lots were occupied together by the testator, in his lifetime

The next question which I shall consider, is, whether valid trusts to receive the rents, profits, and income of the shares of Mrs. Rhoades and Mrs. Hudson, for life, are created by the eleventh and twelfth clauses of the will, so far as relates to the real and personal estate embraced in the eighth clause. First, as to the devise and bequest to Mrs. Hudson : If there had been a direct devise and bequest to the executors, of the real and personal estate embraced in that share, in trust to receive the rents and profits and income, during her life, and apply the same to her use, with a limitation over of the capital of the estate to her heirs after her death, there could be no doubt that a valid trust would have been created, vesting the legal title in the executors during the continuance of her life ; under the third subdivision of the fifty-fifth section of the article of the revised statutes relative to uses and trusts. (1 R. S. 728.) And in the case of *Gott v. Cook*, (7 Paige's Rep. 521,) this court decided that a trust to receive the rents, profits and income of property, and to apply them to the use of the *cestui que trust*, by paying the same over to him in money after they had accrued and been received by the trustee, was applying such rents, profits and income to the use of the *cestui que trust*, within the intent and meaning of the provision of the revised statutes on this subject. It is said, however, that there is no devise or bequest to the executors, as trustees of this share of the estate ; and therefore that Mrs. Hudson takes the legal estate therein, by a devise to her of the income and avails of her share of the property. This would undoubtedly have been so, as to the real estate, if there had been nothing else in the will to show that the testator intended to create a valid trust of the estate for her benefit during her life. For a devise of the rents and profits of land for life, without any thing more, is but a different mode of expression to create



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a devise of the land itself during the same period. (1 *Rob. on Wills*, 3d *Lond. ed.* 404.) Here, however, the testator clearly shows that he intends that his daughter Gertrude shall receive the rents and profits of the real estate embraced in that share, as well as the income of the personal estate included therein, through the medium of the executors. The executors therefore take the legal title to her share of the real estate, as trustees, by implication, to enable them to rent the premises, and receive the rents and profits thereof, and pay them over to her, or apply them to her use.

The same question arose, in England, about one hundred and fifty years since, and, as I understand the different reports of the case, was decided the same way, in *South v. Allen*, (*Comb. Rep.* 375 ; 5 *Mod. Rep.* 98, and 1 *Salk.* 228, *S. C.*) *Salkeld*, it is true, states the case as having been decided against the executrix, contrary to the opinion of Holt, C. J. But it will be seen by a reference to the record, which is set out at length in the report in 5 *Modern*, that Mrs. Birch and her husband were the lessors of the plaintiff in that case ; and claimed the legal estate in the premises under a clause in the will of her brother, substantially the same as in the present case, devising the rents and profits of the land to her for life, to be paid to her by the executors. *Salkeld's* report of the case is very short, and states that C. J. Holt seemed strongly to incline to the opinion that the executors were trustees for the wife. But he says the *defendant* had judgment by the opinion of Rokeby and Eyre against C. J. Holt. *Comberbach's* report, which is also very short, states what the question was, and that Holt, C. J. at first said, it is a devise to the executors by implication of law, else the will cannot be performed, and the other justices agreed with him ; but Holt afterwards said the devise of the rents and profits is a devise of the land to the wife, and then the subsequent words were void and could not exclude the husband. The other judges, however, retained the contrary opinion ; and said that a devise of the rents and profits was not always a devise of the land. For this they referred to the case of *Griffith v. Smith*, (*Moor's Rep.* 753,) in which case it was

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resolved by all the judges, in the exchequer chamber, that though a devise of the profits is a devise of the land itself, if there are no other circumstances in the case, yet as the executor was to lease the term and pay over the rent to the testator's poor kindred, to whom such profits were devised, the title to the term was in the executor, as trustee. The case is twice reported in the 5th of Modern Reports, first at page 63, under the name of *Bush v. Allen*, and afterwards at page 98, under the same name as in *Comberbach and Salkeld*. In the report of the case at page 63, C. J. Holt gives a very sensible reason for holding that the legal title was not in the wife, but in the executors as trustees for her. For he says "to be paid by the executors to her, shows the testator's intent that the husband should have nothing to do with it. Why should not this be a devise to the executor for her life, upon trust to pay the profits to her? And this is fully to perform the will; the intent of which was to exclude the husband wholly." He however changed his opinion at the next term. But his associates on the bench adhered to his original common sense exposition of the language of the will, in opposition to the mere technicality upon which his change of opinion was founded. And they accordingly gave judgment for the defendants; thereby sustaining the devise to the executors, by implication, in trust to receive the rents and profits of the premises and pay them over to her.

I am not aware of any decision, either in England or elsewhere, conflicting with the judgment in that case. It is true Cruise says the doctrine laid down by C. J. Holt in that case was fully established in the subsequent case of *Say & Sele v. Jones*, (1 *Cru. Dig. tit. 12, ch. 1, § 21.*) But he has evidently made a mistake in supposing, from the report of the case of *South v. Allen* by Salkeld, that the majority of the judges in that case had decided against the trust, and held that the legal estate was in the wife. It may also be proper to remark that the author of the Abridgment of Equity Cases has made the same mistake, in supposing that the decision in *South v. Allen* was against the vesting of the legal estate in the executors, and that Holt's final opinion was in favor of the trust. (See 1

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*Eq. Ca. Abr.* 383.) In the case under consideration there can be no doubt as to the intention of the testator to constitute the executors trustees, to receive the rents, profits and income of Mrs. Hudson's share of that part of his real and personal estate embraced in the eighth clause of the will, for her use during her life, and to pay them over to her annually. And as that intention can be carried into effect without violating any rule of law, it is the duty of the court to sustain the trust which the testator intended to create. For, by the express direction of the legislature, in the construction of every instrument creating, or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it is the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law. (1 R. S. 748, § 2.) Here the executors are of necessity the trustees of the personal estate and of the proceeds of the real estate which they are directed to sell. For they cannot preserve the capital of the fund for the remaindermen in fee, who are to take it after the death of Mrs. Hudson, in any other way than by keeping the capital in their own hands, and putting it out so as to produce an income for the owner of the life estate therein. And there is no reason to suppose the testator could have intended to create a different interest in the real estate, which he has by his will united with the personalty in the division directed by the eighth clause of the will.

The language of the devise and bequest of Mrs. Rhoades' share is a little different. But the express direction to the executors to pay the avails and income of that share to her during her natural life, clearly shows that the testator intended that the executors should take the legal estate therein in the mean time, to enable them to lease the real estate and put out the personal estate, and receive the rents and interest, so as to be able to pay them to her. The decree must therefore declare the construction of the will accordingly.

There is no authority given by the will to sell any of the real estate of the testator, except that which is expressly given

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as to two lots, by the thirteenth clause of the will. The trustees therefore cannot sell any of the real estate, except those two lots, either for the purposes of division or otherwise. But there is an express power in trust given to the executors, by the thirteenth clause of the will, to divide the real estate as well as the personal estate embraced in the eighth article, into four equal parts; and to invest the shares of Elizabeth and Gertrude for their benefit. And this is a valid and imperative power in trust, under the provisions of the revised statutes, to divide the lands embraced in the eighth clause of the will, other than the two lots directed to be sold, into four equal parts, by a valid legal instrument, setting off the share of each in severalty, under the will.

As James R. Craig, one of the executors and trustees, is also one of the parties interested in the division, the proper course is to divide the real estate embraced in the eighth clause, exclusive of the homestead, devised to the widow for life, into four equal shares, as nearly as practicable, and then by lot to determine to whom each share therein shall belong, unless the four children interested therein, after the division thereof into four parcels, shall agree among themselves which parcel shall be set off to each of them. The decree must therefore direct a partition of those lands accordingly; and that the executors execute, acknowledge and put upon record a proper instrument, to be approved by a master, or by one of the justices of the supreme court organized under the new constitution, evidencing the making of the said division or partition, under the power in trust for that purpose contained in the will. And the executors, in making investments of the capital of the shares of Mrs. Rhoades and Mrs. Hudson respectively, of the personal estate, and of the proceeds of the two lots directed to be sold, must take them in their own names, as executors and trustees under the will; specifying in the securities or certificates to be taken as the evidences of such investments for each, the trusts upon which they are held, and the name of the person who is entitled to the income thereof for life; so that the same may be

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kept separate and distinct from all other funds belonging to the estate.

The parties by their stipulation have made provision for the security of the \$8000 for their lunatic brother, in case of his restoration to reason. It is only necessary, therefore, to direct as to the investment of this fund, so as to protect the rights of all parties therein. And the safer way to do it is, to invest it upon bonds and mortgages or in stocks, in the name of the clerk of the court of appeals, and to make the income thereof payable to those who are presumptively entitled to the fund. The executors may therefore pay over to J. R. Craig his \$2000, upon his giving his bond and mortgage upon unincumbered real estate, of double the value, to be approved of by his co-executor, to the clerk of the court of appeals, conditioned to pay the \$2000 to John Craig upon his restoration to reason, to be certified in the manner directed in the will. Or he may procure a good bond and mortgage of a third person, of the same character, to the clerk of the court of appeals, for the \$2000, with a condition to pay the interest to J. R. Craig until the restoration of John to his reason, and to pay the principal to the clerk of the court of appeals, for John, upon the happening of that contingency, and to pay the capital to James R. Craig upon the death of John without having been restored to his reason. Or he may have the \$2000 invested in the public stocks of this state or of the United States, at par, and may receive the dividends thereon until it is ascertained who is to be entitled to the capital of the fund. La Rue Craig's, Mrs. Rhoades' and Mrs. Hudson's \$2000 may be secured in the same manner; except that in reference to the capital of the fund of the shares of the two latter it must be payable to the clerk of the court of appeals for the benefit of John if he should be restored to his reason, and for the use of the heirs at law of Mrs. Rhoades or Mrs. Hudson, after the termination of their life-estates therein. And the interest or dividends, in the mean time, must be paid to Mrs. Rhoades and Mrs. Hudson, respectively, for their separate use. Mr. Rhoades and Mr. Hudson, respectively, are at liberty to give their own bonds and mortgages to the clerk of

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the court of appeals, with the proper condition to secure the rights of all parties in the \$2000 belonging to the shares of their wives, respectively, and to receive that share of the fund from the executors. If either of the four children does not furnish the requisite security within three months after the entry of the decree hereon, the executors themselves may invest the \$2000 belonging to his or her share, in the name of the clerk of the court of appeals; or, may pay the same over to him to be invested, in the manner above specified.

In making the investment of the residue of the shares of Mrs. Rhoades and Mrs. Hudson respectively, the executors should invest them upon bond and mortgage on unincumbered real property in this state, of double the value of such investments, or in stocks of this state or of the United States, in such manner as to produce the best income to the owners of the life estates in the fund, and without endangering or diminishing the amount of the capital, by such investments. And in making such investments from time to time, it will be proper for the executors, whenever it is practicable, to consult with each *cestui que trust*, or her husband; so that the investment may be made in a manner which will be most beneficial to her, without endangering the capital.

The executors having accepted the trusts under this will, and one of them having received a legacy of \$500, in addition to his share of the commissions, upon condition of executing the trust, it would be improper to accept their resignation and cast the burthen upon others, without some good and sufficient cause. The trusts, as to Mrs. Hudson's and Mrs. Rhoades' shares, however, after the division shall have been made according to the provisions of the will of the testator, will be so far severed from the general trust committed to the executors, as to be capable of being vested in different persons; according to the recent decision of this court in the *Matter of Wadsworth*, (2 Barb. Ch. Rep. 381.) Then, upon sufficient cause shown, and upon procuring proper and responsible persons to accept and execute these particular trusts for the usual commissions, or upon receiving a proportionate part of the \$500

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legacy, the court having jurisdiction of the case would probably accept the resignation of the present trustees as to these particular trusts, and appoint others in their places, upon the giving of proper security to protect the rights of the *cestuis que trust*.

Upon the happening of the contingency of Mrs. Craig's dividing the property which she owned at the death of the testator equally between Mrs. Rhoades, Mrs. Hudson, James R. Craig, and La Rue Craig, the ultimate remainder in fee in the homestead, which is devised to the widow for life, and the capital of the fund appropriated to raise her life annuity of \$1600, are only disposed of as a part of the testator's residuary estate, embraced in the eighth clause of his will. If she should so divide her property, therefore, either during her lifetime or at her death, the remainder in fee in the homestead, and the capital appropriated to raise the annuity of \$1600, are wholly unaffected by the provisions of the fourteenth clause of the will. In that event this part of the testator's property forms a part of the rest and residue of the real and personal estate, mentioned in the eighth clause of the will as not therein before devised, bequeathed and disposed of. And the same is, upon the happening of the contingency contemplated, to be divided into four shares and disposed of according to the ninth, tenth, eleventh and twelfth clauses of the will: That is, one-fourth thereof will belong to James, and one-fourth to La Rue; absolutely. And the executors will take one-fourth thereof in trust for Mrs. Rhoades for life, with remainder in fee to her heirs; and the remaining fourth as trustees for Mrs. Hudson for life, with remainder to her heirs. For a residuary devise of real or personal estate carries with it not only the property of the testator in which no interest is devised or bequeathed by other parts of the will, but also all reversionary and contingent interests in property which, in the events contemplated by the testator, are not otherwise disposed of. (*Hopewell v. Ackland*, 1 Salk. Rep. 239. *Brigham v. Shattuck*, 10 Pick. Rep. 309. *Goodtitle v. Knott*, Cowp. Rep. 43. *Willows v. Lydcot*, 2 Vent. 285. *Ridout v. Pain*, 3 Atk. 485. *Doe v. Weatherby*, 11 East's Rep.

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322.) It was not the intention of the chancellor to question the correctness of this rule by the decision in *James v. James*, (4 *Paige's Rep.* 117,) referred to by the counsel on the argument. That case turned upon the particular language of the residuary clause; which, it was held, expressly excluded the house and lot which the testator had previously devised to his wife for life in lieu of dower, with power in trust to dispose of the same by will, to her children by the testator, at her death. I have since, however, had some reason to doubt the correctness of that decision, upon the ground that the testator must have contemplated the possibility that his wife might refuse to accept her devise of the house and lot and the power to appoint the same after her death, as a provision for her in lieu of her dower. In the case under consideration it is plain, from the language of the will, that the testator did contemplate the contingency of his wife's dividing her property equally among the four children. In that event, therefore, the ultimate fee of the homestead, and the capital appropriated for the raising of the \$1600 annuity, was not disposed of by any provision of the will previous to the eighth clause; nor by any subsequent provision which was inconsistent with the disposition made of the residuary estate by the eighth clause of the will.

It is impossible, however, to bring the remainder in fee in the homestead, and the capital of the fund appropriated to raise the \$1600 annuity, within the eighth clause of the will, in the event of the widow's making no disposition of her property in her lifetime, or by will, so that Mrs. Rhoades, who is not one of her heirs or next of kin, will get no part thereof as an heir or distributee; or in the event of her making an unequal distribution between Mrs. Rhoades and the other children of the testator except John. In either of those events the testator has, by the fourteenth clause of the will, made a valid and effectual disposition of the remainder in that portion of his property. The title to the real estate will not pass to the executors as a trust, although they will, as executors, have the personal fund in their hands to be disposed of, as directed by this clause of the will, in equalizing the shares of the four children, in referer :



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to the interests which some of them may have received in the property of the widow. But this clause of the will gives to the executors a valid power in trust, even as to the real estate, so to divide and apportion the same, in the division thereof which they are directed to make, as to produce perfect equality between the four children in reference to what they get of the estate which Mrs. Craig owned at the death of the testator, and what they shall receive of this part of the estate of their father.

The fifty-eighth section of the article of the revised statutes relative to uses and trusts, (1 *R. S.* 729,) provides that where an express trust shall be created for any purpose not enumerated in the preceding sections of that article, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may lawfully be performed under a power, shall be valid as a power in trust; subject to the provisions of the next article relative to powers. The substance and effect of the fourteenth clause of the will, therefore, is, that if there shall be an unequal distribution of the estate of the widow among the four children of the testator, named in that clause as entitled to share in the remainder in fee in the homestead and in the capital of the fund appropriated to raise the annuity, the amount which shall have been received by any of them, from the estate of the widow, shall be brought into hotchpot in distribution. And the executors, under the power in trust given to them by this clause of the will, and by the section of the revised statutes referred to, must make distribution accordingly, so as to produce equality.

The revised statutes require advancements to children to be brought into hotchpot in the division of real as well as of personal estate not disposed of by will. (1 *R. S.* 754, §§ 23, 24, 25.) And there is no more difficulty in making distribution upon that principle here, than there would be in a case arising under these provisions of the revised statutes. The value of the property which Mrs. Craig had at the death of her husband must first be ascertained. And if she makes an unequal distribution of the property, or of the proceeds thereof, estimating such value as the capital to be distributed, or if she suffers it to go to her

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own children as her heirs or distributees, so much of such capital of her estate as each child receives, at its then value, must be brought into the account in distribution of the part of the testator's estate which is to be divided and apportioned by the executors under this fourteenth clause of the will. But in the apportionment and disposition which is thus to be made, Mrs. Rhoades and Mrs. Hudson will take absolute interests in their respective shares of the property thus distributed. For, in the events contemplated, this part of the estate is disposed of by the fourteenth clause of the will among the four children, or their representatives, equally. It, therefore, does not come into the residuary estate embraced in the eighth clause of the will, in which Mrs. Rhoades and Mrs. Hudson are only entitled to life estates. The words legal representatives, mentioned in the fourteenth clause of the will, mean those who represent the children who may have died before the distribution of this part of the testator's estate; that is, their personal representatives so far as their distributive shares of the fund consist of personal property, and their heirs at law as respects the part of it which is real estate. The decree must therefore declare the construction of the will in relation to this part of the testator's property, and the rights and interests of his children therein, accordingly. But as the death of some of the children during the life of Mrs. Craig, and before she shall have disposed of her property to any of the children of the testator, may render a further application to the court necessary, the right must be reserved to any of the parties to this suit interested in this part of the testator's property, or any persons who may hereafter become interested therein, to apply for such farther directions as may be necessary, upon the death of Mrs. Craig.

The stock standing in the name of Mrs. Craig, or in the joint names of herself and her husband, at the time of his death, belongs to her; and is a part of her estate to which the testator refers in the fourteenth clause of his will. But that clause of the will does not in any way control or interfere with her right to use and dispose of her property in any manner she may think proper. It only provides that in case she thinks proper to give

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it in unequal proportions to any of the testator's children except John, the child to whom it is given, or is left by her, shall bring it into hotchpot in the distribution which is to be made of the testator's property under this clause of his will.

The annuities for the widow and for the support of the testator's son John are to commence from the testator's death; so as to give her the \$1600 in semi-annual payments from that time, and to raise \$500 for the support of John for the first year. (*Gibson v. Bolt*, 7 Ves. 96. *Fearnes v. Young*, 9 *Idem*, 553. *Rebecca Owings' case*, 1 *Bland's Ch. Rep.* 296.)

The widow is entitled to the arrears of rents due for lands held in trust as her separate estate; and to the unclaimed dividends upon stocks which formed a part of her separate estate. But the unclaimed dividends, if any there were, upon stocks which stood in the names of the testator and his wife jointly, belong to his estate; although she is entitled to the stock by survivorship, in analogy to a similar interest in lands conveyed to the husband and wife jointly. The executors are also entitled to the moneys refunded for the erroneous assessment upon her lands in the city of Albany; as the legal presumption is that the testator paid the assessment out of his own funds, in the absence of proof that his wife furnished him the funds to pay it out of her separate estate.

The executors are to be at liberty to apply from time to time, if necessary, to pass their accounts in relation to the various trusts. But from the nature of the trusts it does not appear to be necessary to pass their accounts annually; and it would subject the estate to a useless expense. They may be permitted, however, to pass their accounts annually in relation to the shares of Mrs. Rhoades and Mrs. Hudson, with the assent of those *cestuis que trust* respectively. And either of those *cestuis que trust* may apply from time to time, to compel the trustees to pass their accounts and pay over the balances, if any, in their hands, during the continuance of the trust.

The costs of all parties in this suit are to be paid out of the general personal estate of the testator in the hands of the ex

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ecutors. But the costs of any future applications to the court are to be disposed of hereafter.

A reference having been made to a master, in the progress of this cause, to state the accounts of the complainants as executors of the estate of Archibald Craig deceased, J. R. Craig was authorized by the order, on such reference, to present his claim, against the estate, for the amount of a note of \$4000, dated the 31st of January, 1846, payable on demand, and purporting to be given by the testator to J. R. Craig his son; so that the master might take testimony and report as to the validity of the claim; with liberty to the master to make a separate report on that subject. The master reported in favor of the validity of the claim, against the estate of the testator, in a separate report. Exceptions to the report were taken by most of the other parties who were interested in the estate of the testator.

A. C. Paige, for James R. Craig. The note is a valid note in the hands of James R. Craig, as a *donatio mortis causa*. It was executed by the testator and delivered by him to David Tomlinson, in his, the testator's, last sickness, for the use of James R. Craig, and to be delivered and paid to him at the decease of the testator. This transaction has all the characteristics of a valid *donatio mortis causa*. The gift of the note was made in the last sickness of the donor, and in contemplation of death. It was to take effect on the donor's death by his existing disorder, or in his existing illness. It was actually delivered to a third person, (Tomlinson,) for the use of the donee, James R. Craig, and to be given to him on the testator's death. (*Story's Eq. Juris.* § 607, a., and cases cited in notes, last ed. *Toller's Executors*, 233. 2 *Kent's Com.* 444. 1 *Williams on Ex'rs*, 499.)

Promissory notes may be subjects of a *donatio mortis causa*. (1 *Paige's Ch Rep.* 316. 1 *Cowen's Rep.* 598. *Story's Eq*

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*Juris.* § 607, *a.* 3 *Bin.* 366. *Duffield v. Elwes*, 1 *Bligh's New P. R.* 497.) The only question which can arise on this part of the case is, whether the gift was made in the donor's last illness. It cannot be denied that it was made in contemplation of death; that it was to take effect on the donor's death; and that it was actually delivered to a third person for the use of the donee. Was then the gift made in the donor's last illness? We insist that it was. Doctor Vedder says that there was no recovery from his attack in January, 1846, (during which attack the note was given,) and that the same sickness continued until his death. And he says that the constant apprehension and danger of his death continued from January until he died, in July, 1846.

To make a gift *mortis causa* void, the donor must recover from his sickness. (2 *Kent's Com.* 444. *Swinb.* 18. 1 *P. Wms.* 404. 1 *Ves. Jr.* 546. 3 *Bin.* 366.) There was no recovery here. The donor came to his death by his existing disorder, and in his existing illness. (*Story's Eq. Juris.* § 607, *a*, *last ed.* 1 *Williams on Ex'rs*, 499, 500.) To make a gift valid as a *donatio mortis causa*, it is not necessary that it should be made in the *last extremity*. It is sufficient if it be made in the last sickness of the donor; the sickness immediately preceding his death, without reference to any precise period of the disease; especially if there be a constant apprehension of death, (as there was here.) (1 *Williams on Ex'rs*, 499, 500. *Blount v. Barrow*, 1 *Ves. Jr.* 546. 4 *Brown, C. C.* 81. *Miller v. Miller*, 3 *P. Wms.* 356. 1 *Idem*, 404, 441. 2 *Ves. Jr.* 111.) And the apprehension of death may arise from infirmity, or old age, or from external and anticipated danger. (2 *Kent's Com.* 444.) It is not necessary that the donor should be surprised by a sudden and violent sickness, leaving him no opportunity to make a will.

But even if the delivery of the note, on the 31st January, 1846, to Tomlinson, for the use of James R. Craig, was too long previous to the death of the testator to make it a valid *donatio mortis causa*; this objection is obviated by the testator's confirmation, very shortly previous to his death, of the

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execution and delivery of the note, as a *donatio mortis causa*. This confirmation is equivalent to an original *donatio mortis causa* of the note, made at the time of the confirmation. It was a renewal of the gift; a revival of it, if the former donation had ceased to be operative. A *donatio mortis causa* has some of the characteristics of a legacy. It is like a bequest of the testator. (*Story's Eq. Juris.* § 607, a.) It is a disposition of his property to take effect after his death; and being such, the intention of the donor, or testator, should not be defeated. The gift should be allowed to take effect unless the law peremptorily forbids it. The gift should be favored. The testator intended that James R. Craig should have this note over and above the devises and bequests made in his favor in the will.

Again; this note may be sustained, in the hands of James R. Craig, as a note given upon a sufficient consideration. If so, it is a legal claim, in his hands, against the estate of A. Craig, deceased.

J. C. Spencer & M. T. Reynolds, for J. Rhoades and wife, and for J. T. Hudson and wife. The statements in the master's report as to the consideration and motives of the testator in giving the note, are not sustained by the evidence. Judge Tomlinson and Mr. Gibson are the only witnesses who are competent to testify to the transaction, as it occurred in their presence. Subsequent loose remarks are entitled to no weight against their statements; and least of all, to supply material facts which they do not state. We contend that it is evident from the whole testimony, (particularly the fact stated by Mr. Gibson, that the testator was *satisfied* with the assurance Mr. Gibson had given him that James R. Craig's services and expenses would be a proper charge against the testator's estate,) that there was no pecuniary consideration in the mind of the testator, but that the note was intended as an alteration of his will, and a mere gift. The same requisites are necessary to constitute a valid gift *inter vivos*, and a *donatio causa mortis*: and the only difference between them is that the latter is revoked by the fact of the recovery of the testator from the sick-

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ness in which the donation was made; while, if the former be once completed and executed, it is not revocable by any act of the donor. *Walter v. Hodge*, (2 Swans. 97,) contains the exact rule on this subject, as above stated. In *Irgus v. Smallpiece*, 2 Barn. & Ald. 552,) Ch. Justice Abbott says, "It, (a gift,) differs from a *donatio causa mortis*, only in this respect, that the latter is subject to this condition, that if the donor lives, the thing shall be restored to him. In *James Smith v. George Smith*, (7 Carr. & Payne, 401,) the gift of a watch, by a father to his son, completed by delivery, was held to be irrevocable, and that the father could not reclaim it. In *Grover v. Grover*, (24 Pick. 261,) it was held that the principle of revocation does not apply to a gift *inter vivos*.

An essential requisite to the validity of a *donation*, or gift, is, delivery of the thing given, or such an instrument of conveyance as transfers the right to immediate possession. In *Irons v. Smallpiece*, (2 Barn. & Ald. 552,) Ch. Justice Abbott says, "By the law of England, in order to transfer property by gift, there must be either a deed or instrument of gift, or there must be an actual delivery of the thing to the donee." In *Hooper v. Goodwin*, (1 Swans. 486,) the master of the rolls says: "A gift at law or in equity supposes some *act* to pass the property, if the subject is capable of delivery; if a chose in action, a release or other equivalent instrument; in either case a transfer of the property is required."

A promissory note of the donor is not such an instrument as transfers the property in the amount of money specified, or a right to the possession of it. In former times it was held that no chose in action, neither the promissory note of a third person, nor a sealed obligation, could be the subject of a gift. (See *Miller v. Miller*, 3 P. Wms. 356; *Ward v. Turner*, 2 Ves. sen. 442.) But this doctrine is now repudiated, and a bond is capable of gift by mere delivery. (*Blount v. Blount*, 1 Ves. jun. 546. *Gardner v. Parker*, 3 Mad. 184.) So as to lottery tickets, (*Grangiac v. Arden*, 10 John. 293;) or, a promissory note of a third person. (*Coutant v. Schuyler*, 1 Paige, 318 *Grover v. Grover*, 24 Pick. 261.) But all these, being execu-

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ted instruments, and having value in themselves, stand upon a footing entirely different from the promissory note of the donor. It is true, there are some cases where such a promissory note has been held a valid instrument of gift. (*Bowers v. Hurd*, 10 *Mass. Rep.* 428. *Wright v. Wright*, 1 *Cowen*, 598. *Woodbridge v. Spooner*, 1 *Chit. Rep.* 661. *Seton v. Seton*, 2 *Bro. Ch. Ca.* 610.) But these cases are met and overwhelmed by such a torrent of authority that they cannot be maintained. And the principle on which they are assailed is so vital, so universal, that these cases must be abandoned, or the law must be torn up from its foundation. The principle is correctly stated by Blackstone, (2 *Comm. ch.* 30, *p.* 445,) "a consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*—or agreement to do or pay any thing on one side, without any compensation on the other—is totally void in law, and a man cannot be compelled to perform it." It is true, he afterwards says: "For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of consideration, in order to evade the payment; for every note, from the subscription of the drawer, carries with it an internal evidence of good consideration." That this remark should have been confined to the case of an endorsee, is conclusively shown by Mr. Fonblanque in his note (a) at page 355, vol. 1st of his treatise. There is literally no end to the cases which have decided that a *promissory note* cannot be enforced against the maker by the payee, when it appears that there was no pecuniary consideration. (*Buller's N. P.* 274. *Rann v. Hughes*, 7 *T. R.* 350.) In Massachusetts the question underwent a thorough discussion in the case of *Parish v. Stone*; (14 *Pick.* 198;) and most of the authorities are collected in that case. It is entirely decisive of the law, then, that a promissory note of the donor cannot be the subject of a *donatio causa mortis*, or of any gift. This case disposes of *Bowers v. Hurd*, (10 *Mass. Rep.* 427,) in which a contrary principle was intimated. 6 *New Hampshire Rep.* 386, settles the law in that state, in the same way. 10 *Conn. Rep.* 485, is equally decisive of the law in that state, in the



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same way. 5 *Gill & John*. 54, shows the same law in Maryland. In England, the last reported case, directly on this point, is *Halliday v. Atkinson*, (5 *Barn. & Cress*. 501,) which is also a direct decision that a promissory note cannot be the subject of a gift. In the state of New-York—with the exception of *Wright v. Wright*, before quoted, and a case in the superior court of New-York—the decisions have been uniform and uninterrupted. *Noble v. Smith*, (2 *John*. 52,) was a very full and deliberate examination and discussion of the question. *Pearson v. Pearson*, (7 *John*. 26,) was an affirmance of the same doctrine: and it was again repeated directly and distinctly in *Fink v. Cox*, (18 *John*. 147.) There are other cases sustaining the same principle. (*Thorn v. Deas*, 4 *John*. 84. *Schoonmaker v. Roosa*, 17 *Id.* 301.) And what is remarkable is, that none of these cases, were carried to the court for the correction of errors, although some of them, obviously, were severely contested. Does not this furnish satisfactory evidence of the general professional opinion on the subject? We might have cited an array of cases and given extracts from all the elementary writers, who, without a single exception, as far as known to us, concur in the view here taken—that to render valid and actionable an executory undertaking, there must be a valuable consideration. But the cases already quoted are so decisive, and as they contain references to most of the others, we deem it superfluous to accumulate them. The case in the superior court of New-York, (*Parkeſ v. Emerson*, 9 *Law Rep.* 76,) is confessedly founded upon the binding authority of *Wright v. Wright*, and upon a mistaken view of *Coutant v. Schuyler*, (1 *Paige*, 316,) in which Judge Vanderpool supposes that the chancellor held that the promissory note of *the testator* was a valid subject of a gift. The case shows that it was the note of David Marsh, and the chancellor expressly states the question to be, whether the note of a *third person* is a proper subject of a gift. Although a *delivery* of a promissory note would not, according to our view, render it valid as between payee and maker, or his representatives, yet in this case even that circumstance is wanting. From the testimony, it is evident that this note, although

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in the hands of Mr. Tomlinson, was there as a mere deposit: and subject at all times to be recalled by the testator. The case of *Bunn v. Markham*, (7 Taunt. 224,) is a very strong case to show that the delivery must be absolute, and the property put so completely out of the control of the donor that he cannot reclaim it. The judges remark upon the fact that the property was to be delivered upon the decease of the testator, as being evidence that there was no delivery by him. Burrough, J. says, the son had no authority to deliver the things to his mother, and it therefore was *not a donatio*. He must mean that there was no authority to deliver to the mother during the life of the testator—for there was an express direction to deliver after his decease. It is evident from the testimony here, that the note was not to be delivered until after the testator's death.

It is true, that in *Coutant v. Schuyler*, (1 Paige, 316,) the chancellor recognized the decision in *Wells v. Tucker*, (3 Bin. 366,) that a gift to a third person, for the use of the intended donee, was a valid gift. But it is submitted that the question is still open for consideration, and that upon principle, the gift should be in such a condition that the donee may at once reduce it into his own possession.

*J. V. L. Pruyn & D. C. Smith*, for the infant defendants. On the part of the infant defendants, we adopt the argument of the counsel for Mr. and Mrs. Rhoades, and for J. T. Hudson and wife, who have preceded us; and we also submit the following views in addition. It is essential to the validity of a gift, as well as of a will, that the testator should be of sound mind at the time, and capable of discrimination and the exercise of a proper judgment. In making a will, the term disposing has been used as indicating this state of mind. We say that the testator must be of sound and disposing mind. The revised statutes have used the word competent, which embraces both. It is evident that the testator, Archibald Craig, was in a feeble state of body and mind at the time the note in question was given; although he rallied afterwards, and lived for several months. In the month of April previously, Mr. Gibson, when advised as to al

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tering the testator's will, said it could not be done, as he did not consider him in a state of mind competent to do a legal act. At the time the note was given, Mr. Gibson again advised against making a codicil to the will, for the reason that its validity might be drawn in question on account of the testator's situation. There is, also, intrinsic evidence in the transaction that the testator could not have been in the full possession of his faculties at the time. He was a clear headed business man, admittedly shrewd in money matters. Now what is the case before us? He had charged his son \$6000, payable at the end of five years, without interest, for a farm of 300 acres, which Mr. Linn testifies is worth \$60 per acre, or \$18,000. He says he would give \$50 per acre for it. Deducting simple interest for five years, it would give James the farm for somewhat less than \$4500, at the time of his father's death; or, by compounding the interest, which for so long a period would be the true mode, it would be about \$4200. In other words, \$4200 invested at the time of his father's death and accumulated to the end of five years, would amount to the \$6000. This last mentioned sum James was then to pay; and in the mean time he would have had the enjoyment and income of a farm worth from \$15,000 to \$18,000. Now what did the testator wish to do? He spoke of the \$6000 as a large sum for James to pay, although he was to have five years in which to pay it; with this valuable farm and a very considerable estate in hand for the purpose, and was in fact to pay but three-fourths of it; he being entitled to the one-fourth himself. This circumstance alone would be evidence of great prostration of the testator's mental faculties. But he went farther—he desired to relieve him *to some extent*, as Mr. Gibson says he expressed it, against this charge. He thought he had charged him too much for the farm; and directed the note in question to be prepared; which note, if valid, would give James \$4000 at once, upon the testator's death, to pay \$4200 or \$4400, according to the mode of computing interest. Call it the larger sum, and it would leave \$400 only as the difference. But as this \$400 would be a charge on the whole estate, before its division, James would

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receive \$4000 to pay three-fourths of \$4400 to the three other children; that is \$4000 to pay \$3300; in truth, giving him the farm for nothing, and \$700 besides, before any part of the testator's estate was to be divided among his children. Is it possible that the testator could have intended this? Is it not in direct conflict with his declared intentions to the persons present at the time? They evidently did not go into any calculations on this subject. Both Mr. Tomlinson and Mr. Gibson concur in showing that the testator named the amount, and that the subject was not discussed. That he did not mean to give James Craig the amount at once is evident, as he refused to give him stocks or property as was suggested by Mr. Gibson to the testator that he should do instead of executing the note.

The whole transaction evidently shows that the testator, in the weakness of his mind, had forgotten what his will was; and, as Mr. Gibson rightly supposed, he was in a state of mind in which a question would necessarily have arisen as to his testamentary capacity if he had altered his will. The inevitable result of his attempted action, if the note should be sustained, would be to defeat his own declared views. He evidently intended that James should give at least some considerable part of the \$6000 for the farm. How this intention would be carried out by sustaining the validity of the note in any shape, has already been seen.

It has been said that the note might be sustained as a gift to James R. Craig for services. The attempt to prove services to any extent utterly failed. Certainly none were shown which could have induced the testator to give James \$4000 in addition to what he had already done for him. But it is a conclusive answer to this branch of the case to say, that the testator declared his reasons to be of an entirely different character and such as were stated to Mr. Gibson and Mr. Tomlinson and have been already adverted to. The attempt to show other declarations of the testator, by the examination of Judge Tomlinson, before the master, entirely failed.

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THE CHANCELLOR. The master is clearly wrong in supposing that there was any consideration for the note in question. It is true the complainant had performed some services for his father, both before and after the date of the note. But from the testimony before the master it is evident those services, if they were not paid for by the testator, did not enter into the consideration of this note. I have also great doubts whether the testator, at the time the note was given, was in a situation to make a disposition of his estate, to this extent, with judgment and understanding. He had made his will with great care only six or seven months before, as Mr. Gibson, who drew the will, testifies. The will itself also declares upon its face that it is the intention of the testator that his four children and their descendants shall share equally, not only in the property which he holds in his own right, but also in that which is vested in his wife and subject to her disposition. And the testator made a very special provision to carry that intention into effect, as far as it was possible for him to do so in a testamentary disposition of his property. He had, from the spring of 1844, had several attacks of apoplexy, which affected his nervous system to a considerable extent. But in the latter part of January, 1846, he had a much more serious attack than he had ever before had, which entirely prostrated him; so that his attending physicians gave it as their opinion that he could not survive. It was while he was lying in this situation, as I understand the testimony, that Mr. Gibson, who had prepared the will with so much care, under the testator's special directions and dictation, was sent for to alter the disposition which the testator had previously made of his property in case of his death. And it is not pretended that any thing had occurred, either in his family or in the situation of his property, to induce a change in the will. Under such circumstances, I think both Judge Tomlinson and Mr. Gibson very wisely urged him not to alter his will at that time. For if he had attempted to alter it under those circumstances, in favor of the children who were then around him, the probability is that the testamentary disposition then made would have been declared invalid. The testimony

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n relation to the value of the farm devised to James R. Craig, in reference to the amount charged for the same in the will, shows that the inequality in the will was in his favor and not against him. After it was found that the testator was not in a situation to alter his will with safety, some one, who is not named in the testimony, suggested the giving of a note for the four thousand dollars. And then the note in question was drawn by Mr. Gibson, and signed by the testator, and placed in the envelope with his will, and delivered to Judge Tomlinson. The testimony also shows that they were to be kept together, and not to be delivered to any one without the testator's assent, until his death.

It is perfectly evident from the testimony of Judge Tomlinson, that the testator never intended to place this note beyond his own control during his lifetime, any more than he did his will; but that it was to be kept with his will, as forming a part of the testamentary disposition of his property. If Tomlinson was the mere agent of the maker of the note, to keep it for him—with his will and subject to his control—and not merely as the trustee of the son to hold it for the use of the latter, in case the disease under which the donor was then laboring should terminate fatally, so as to place it beyond the reach of the maker of the note unless he should recover—it wanted one of the essential requisites of a good *donatio mortis causa*; an absolute delivery, and continued change of possession. (*Bunn v. Markham*, 7 Taunt. Rep. 224.)

Again; the weight of authority appears to be against the principle that the donor's own note, merely creating a debt against himself, can be the proper subject of a gift *mortis causa*. Most of the cases referred to for the purpose of showing that such a gift is valid, were cases of gifts *inter vivos*. For until within about thirty years, it was supposed to be the law, that a promissory note was not only *prima facie* evidence of value, but that it could not be contradicted by parol evidence to show that the maker had actually intended to give a void note, for which he knew there was no consideration whatever; and that it was only open to him to impeach the note by showing a *failure of*

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the consideration upon which it was given or intended to be given, or that the consideration was illegal. Thus, in the case of *Seton v. Seton*, (2 Bro. Ch. Rep. 610,) where the mother gave her promissory note to a third person, as a trustee of a child of which she was then *enciente*, Lord Thurlow overruled a demurrer to a bill in behalf of the child, considering it a valid gift to the child. That, however, was not a gift *causa mortis*, for the bill was filed against the mother herself; and in *Tate v. Hilbert*, (2 Ves. jun. 112,) which came before Lord Rosslyn four years afterwards, although he held that the note given in that case was not a gift *mortis causa*, and that the complainant had no right to come into equity for it, he intimated a decided opinion that the payee of the note could recover it at law as a valid gift *inter vivos*. He indeed says it would be no objection to an action on the note that the payee had given no value for it; and the bill was dismissed without prejudice, that the decision might not be deemed a decision of the court against the right to bring such an action. And in *Woodbridge v. Spooner*, (1 Chit. Rep. 661,) which came before the court of king's bench in England in 1819, that court directly decided that such a note was valid as a gift *inter vivos*; and that the personal representatives of the maker were not at liberty to avail themselves of the want of consideration. A similar decision was made by the supreme court of Massachusetts in 1813, in the case of *Bowers v. Hurd*, (10 Mass. Rep. 427.) In both of those cases, however, it was admitted by the court that the promissory note of the donor could not be supported as a *donatio mortis causa*. It has since, however, been decided in Massachusetts and in England, as well as in this state, that the promissory note of the donor is not a good gift *inter vivos*; and that the donor, or his representatives, may impeach such a note for want of consideration. (*Parish v. Stone*, 14 Pick. Rep. 198. *Halliday v. Atkinson*, 5 Barn. & Cress. 501. *Fink v. Cox*, 18 John. Rep. 145.)

It was at a very early day decided in England that a draft by the donor upon his banker, payable after his death, for mourning, accompanied by an actual delivery of the draft to

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the donee, in the last sickness of the donor, and intended to take effect after his death, was valid as a *donatio mortis causa*; such draft being accompanied by a written declaration showing that it was only intended to operate in case of the death of the donor. And Sir Joseph Jekyl decreed that it should operate as an appointment, or an appropriation of the amount of the fund for which it was drawn, to the use of the donee. (*Lawson v. Lawson*, 1 P. Wms. 141.) I am not aware that that decision has ever been overruled. Indeed, Lord Rosslyn, in the case of *Tate v. Hilbert*, before referred to, after examining the register's books, said that decision was right; upon the ground that it appeared by the written memorandum that it was not intended to operate immediately. And as that was the law in England previous to our separation from the mother country, it may still be the law here. In the case of *Wright v. Wright*, (1 Cowen's Rep. 598,) the late supreme court of this state decided that the donor's own note was a good gift *mortis causa*, and that a suit was properly brought against the representatives of the donor upon the note itself. That decision has recently been overruled by a branch of the new supreme court, in the case of *Harris v. Clark*, (2 Barb. Sup. Court Rep. 94;) where it was held that an action at law could not be maintained by the donee of a draft against the personal representatives of the drawer. That decision, however, as I understand it, is not in conflict with the decision of Sir Joseph Jekyl in the case of *Lawson v. Lawson*, that the draft may operate as an appointment of the fund upon which it is drawn. The opinions of the judges in the cases of *Woodbridge v. Spooner*, and of *Bowers v. Hurd*, before referred to, are in conflict with the decision in *Wright v. Wright*, that the promissory note of the donor is a good gift *mortis causa*. In addition to this, the courts of three or more of our sister states have decided that such a note is not valid. (*Parish v. Stone*, 14 Pick. Rep. 198. *Raymond v. Sellick*, 10 Conn. Rep. 480. *Copp v. Sawyer*, 6 N. Hamp. Rep. 386.)

As I said before, therefore, the weight of authority is against the validity of the donor's promissory note as a gift *mortis*



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*causa.* And when it is seen how easy it is for those who are surrounding the bedside of a dying man to obtain from him, by importunity, gifts of that character, the safer rule is to hold a note of that kind invalid.

The exceptions to the master's report must be allowed; and the claim for the amount of the \$4000 note, must be rejected as illegal or unfounded. But this is not a case to charge the claimant personally with costs. The costs of the parties upon the exceptions to the report and upon the reference, as to this claim, must therefore be paid by the executors out of the personal estate of the decedent.

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DE RUYTER *vs.* THE TRUSTEES OF ST. PETER'S CHURCH  
and others.

[Affirmed, 3 N. Y. 233.]

By the English common law, corporations aggregate, including religious corporations, and some corporations sole, had the same right as natural persons to alien real estate, which they had the capacity to take and hold; and for the same purposes and objects.

It is a natural presumption, and therefore adopted as a rule of law, that on the settlement of a new territory by a colony from another country, and where the colonists continue subject to the government of the mother country, they carry with them the general laws of that country, so far as those laws are applicable to the colonists in their new situation; which thus become the unwritten law of the colony until altered by common consent, or legislative enactment.

A corporation has the right to make an assignment in trust for its creditors; and may exercise it to the same extent, and in the same manner, as a natural person; unless restrained by its charter, or by some statutory provision.

The trustees of a religious corporation have the power, with the consent of the court of chancery, and under the sanction of its order, to make an assignment of the real estate of the corporation, to trustees, in trust for the payment of all the creditors of the corporation ratably. And their deed of such real estate, under the corporate seal, will vest in the grantees the legal title of the corporation in such real estate and in the equity of redemption in mortgaged premises.

THIS was an appeal from an order of the vice chancellor of the first circuit, upon exceptions to a master's report as to the

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right to the surplus moneys, on a foreclosure and sale of mortgaged premises. The premises, at the time of the execution of the complainant's mortgage, and at the time of the conveyance to Power and Pise, as hereafter mentioned, belonged to The Trustees of St. Peter's Church in the city of New-York, a religious corporation created by a special act of the legislature, in April, 1817. On the 7th of September, 1844, the corporation being insolvent and owing about \$142,000, including the mortgages upon its real estate, resolved to convey all its property, real and personal, to the appellants, as trustees for the payment of all the debts ratably; except the debts already secured by mortgages thereon. A petition was thereupon presented to the vice chancellor of the first circuit, for an order permitting the corporation to sell and convey its property to Power and Pise in trust as aforesaid; and an order was made by the vice chancellor, according to the prayer of the petition, on the 13th of September, 1844. On the same day, the corporation made a conveyance accordingly, under its corporate seal, which was accepted by the appellants as such trustees; and was duly recorded as a conveyance of real estate on the 14th of the same month. Two days after the recording of this conveyance in trust, Alice Lalor and others, as the personal representatives of J. A. Neil deceased, recovered a judgment against the corporation for a debt of about \$3000. And at the same time, Eliza Gallagher recovered another judgment for a debt, due to her, of about \$2000. Three other judgments were afterwards recovered against the corporation, in the latter part of the same month. All these judgments were duly docketed, so as to become liens upon any real estate which belonged to the corporation at the times when they were respectively recovered. The mortgaged premises were afterwards sold, under the decree of foreclosure and sale in this cause, and produced a surplus of about \$2500 only. And on the 16th of January, 1845, the usual order of reference was made to the master, upon the application of Power and Pise, the trustees, to ascertain and report who was entitled to the surplus moneys, and the priorities of the several liens thereon. On the 18th of the same month,

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Alice Lalor and others, the plaintiffs in the first judgment, applied to the vice chancellor to vacate the order allowing the corporation to convey its property in trust for the payment of its debts. Their motion was denied, and they thereupon appealed from that decision. The chancellor, upon the argument of the appeal, was of opinion that the vice chancellor had not authority, under the act relative to religious corporations, to authorize the trustees of the corporation to assign all its property to other trustees for the payment of its debts, and that no title passed to the new trustees by the conveyance from the corporation. But he decided that the appellants, not being parties to the order authorizing such sale, had no right to apply to set it aside, they having no interest in the question. He therefore dismissed the appeal on that ground, without considering the question whether parties who had no lien upon the real estate at the time of entering the order authorizing a sale, could apply to set it aside if it was merely erroneous.

The master, upon the reference directed to him, reported that all the judgments were valid liens upon the equity of redemption in the mortgaged premises at the time of the sale under the decree of foreclosure; and that the two first judgments being docketed at the same time, must be paid ratably out of the surplus moneys; and that the conveyance to Power and Pise, in trust for all the creditors of the corporation, was void and gave to the trustees no interest in the surplus moneys. Power and Pise excepted to the report, and the vice chancellor, upon the hearing before him, overruled the exceptions and confirmed the master's report. From this decision of the vice chancellor, Power and Pise, the trustees, appealed.

*J. Blunt*, for the appellants.

*L. Livingston*, for the respondents.

THE CHANCELLOR. Upon a former occasion, on the argument of an appeal, I came to the conclusion that the authority given to the chancellor, to authorize a religious corporation to

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sell its real estate did not extend to the case of a conveyance of the estate of such a corporation to trustees for the payment of all its debts ratably, and that the order of the vice chancello could not affect the rights of the appellant in the case which was then before me. That appeal, however, was properly dismissed upon another ground. For, as the order was made while the appellants were mere creditors at large, and when the corporation might have produced the same effect by confessing a judgment to a trustee to secure the payment of all its creditors ratably, the appellants had no right to interfere with that order, if it was not void, but merely erroneous. The question as to the power of the court to make such an order, and the right of the corporation to make a general assignment for the benefit of all its creditors ratably, with the sanction of the court, has been more fully argued upon this appeal. I have also examined the question with great care, and have come to the conclusion that the opinion which I formerly expressed was wrong.

By the English common law, corporations aggregate, including religious corporations, and some corporations sole, had the same right to alien real estate which they had the capacity to take and hold, and for the same purposes and objects, as natural persons. (*Smith v. Clifford*, 1 *Sid. Rep.* 162. *Covent. Coke Lit.* 44, 300. *Com. Dig. Franchise*, F. 18. 1 *Ves. & Beame*, 244. 2 *Kent's Com.* 281.) Several statutes, however, were passed in the reign of Elizabeth, and one in the first year of her successor, restraining alienations of church property by religious corporations; and restricting the power of leasing the same, for a longer period than twenty-one years, or three lives, or below the accustomed rents. (*See 1 Evans' Stat.* 381 to 390.) These statutes, forming a part of the law of England at the time of the settlement of this state by colonists from England, under the charter to the Duke of York, were probably brought hither by those emigrants, and became a part of the laws of the colony; although they were not afterwards re-enacted here. For it is a natural presumption, and therefore adopted as a rule of law, that on the settlement of a new territory by a colony

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from another country, and where the colonists continue subject to the government of the mother country, they carry with them the general laws of that country, so far as those laws are applicable to the colonists in their new situation ; which thus become the unwritten law of the colony, until altered by common consent or legislative enactment. (5 *Wend. Rep.* 445. 17 *Idem*, 584.) That there was a common law existing in this state, restraining religious corporations from alienating church property, is evident from the fact that in March, 1806, the legislature thought it necessary to pass a special statute, authorizing the chancellor, upon the petition of the corporation, to make an order for such sale, and for the application of the proceeds thereof to such uses as the corporation, with his assent, should conceive to be most for the interests of the society to which the property so sold did previously belong. (4 *W. & S. Laws*, 360.) And this is the provision which the revisers, in 1813, embodied in the general act for the incorporation of religious societies. (3 *R. S.* 298, § 11.)

The trustees of this particular corporation, by the first section of the act creating it, (*Laws of 1817*, p. 240,) are expressly authorized to give, grant, demise, lease, or otherwise dispose of the real as well as the personal estate of such corporation, as shall appear to them to be just, for the use, benefit and advantage of the church and congregation, with the concurrence of the chancellor, to be first had and obtained, in the manner specified in the eleventh section of the act for the incorporation of religious societies. And the revised statutes conferred upon the vice chancellor concurrent jurisdiction with the chancellor, within the first circuit, of all causes and matters of which the cognizance was vested in the chancellor by statute. It was a matter of discretion, therefore, with the vice chancellor, whether he would make an order allowing the trustees to dispose of the real estate of the corporation, in the manner specified in their petition, for the payment of all the creditors of the corporation ratably. And their deed under the corporate seal, vested the equity of redemption in the appellants, for the purposes specified in that deed ; unless there is some rule of law which deprives

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a corporation of the power to convey its property and effects to trustees, to sell the same for the benefit of its creditors, in the same manner as if the corporation was a natural person.

No person can suppose that a corporation which, by its charter, is to exercise its franchises and carry on its ordinary business by officers and agents, elected or appointed in a particular manner, can transfer all its franchises and business to other persons, to be exercised by them as general trustees. Hence the question has frequently arisen and been discussed, whether a corporation can make an assignment of its property to a trustee to sell the same and apply the proceeds to the payment of its debts; or whether the directors or trustees of the corporation must themselves sell the property and distribute the proceeds, or transfer the property directly to the creditors in payment of their debts. And it appears to be settled by a weight of authority which is irresistible, that a corporation has the right to make an assignment in trust for its creditors; and may exercise that right to the same extent, and in the same manner, as a natural person, unless restricted by its charter, or by some statutory provision.

This question was involved in the decision of the supreme court of the United States in *Lenox and others v. Roberts*, (2 *Wheat. Rep.* 373,) in which the assignees of the first Bank of the United States were permitted, in equity, to recover a demand which had been transferred to them by the corporation before its dissolution, under a general assignment of all the property of the corporation, in trust, to pay its creditors and to distribute the residue among the stockholders, upon the expiration of its charter. In *Hartun v. Bishop*, (3 *Wend. Rep.* 13,) which came before the supreme court of this state, in 1829, an insolvent bank made a general assignment of all its property, in trust to sell the same, and apply the proceeds to the payment of all the creditors of the bank ratably. And Chief Justice Savage held that the assignment was valid. The same question came before the supreme court of Alabama in 1830, in the case of *Pope v. Brandon*, (2 *Stew. Rep.* 401,) where an incorporated bank, a few days before the expiration of its charter.

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made a general assignment of all its property and effects to trustees to convert the same into money and pay the debts of the corporation ratably, and to distribute the surplus, if any, among the stockholders. And the assignment was held valid. The like decision was made by the court of appeals of Maryland, in 1834, in the case of *The State v. The Bank of Maryland*, (6 *Gill & John. Rep.* 205 ;) where an insolvent corporation made a general assignment to trustees to pay all its debts ratably. In 1839, a like decision was made by the supreme court of Vermont, in the case of *Warner v. Mower*, (11 *Verm. Rep.* 385,) upon an assignment of the property of a manufacturing corporation in trust for its creditors, but giving preferences. Redfield, J., who delivered the opinion of the court in that case, says there can be no question that corporations of this character, as well as natural persons, may assign their property for the benefit of their creditors. And if they may do this, it follows of course that they can give such preferences as any other debtors may. In *Flint v. The Clinton Company*, (12 *New Hamp. Rep.* 431,) which came before the supreme court of New Hampshire in 1841, the court decided that a general assignment, by a corporation, in trust for the payment of all its debts ratably, was valid. In 1842, the same question was brought before the supreme court of Arkansas upon a general assignment made by the Real Estate Bank of Arkansas to a majority of its directors, as trustees for its creditors. And after a most elaborate argument by counsel, and a thorough examination of the case by the court, the assignment was held to be valid. (*Conway Ex parte*, 4 *Ark. Rep.* 304.) A similar decision was made in 1843, by the supreme court of Tennessee in the case of *Hopkins v. The Gallatin Turnpike Company*, (4 *Humph. Rep.* 403;) upon an assignment by an incorporated turnpike company of all its property and effects for the benefit of creditors. It is not necessary to say whether the form of the assignments in the two last cases, and the particular manner in which the trusts were to be executed, were not infringements of the principle that a corporation cannot assign its powers and franchises to others, to be exercised by them as trustees, or oth-

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erwise. In the recent case of *The Susquehanna Canal Company v. Bonham*, (9 *Watts & Serg. Rep.* 27,) the supreme court of Pennsylvania decided that the franchises of a canal company incorporated for the benefit of the public, and the corporate rights of the company, could not be alienated by, or sold upon execution against it. And I cite the cases from Arkansas and Tennessee merely for the purpose of showing the recognition of the general principle by the courts of those states that a corporation may make a general assignment of its effects, which are capable of being sold by the corporation, to trustees in trust for the payment of its debts. The last case to which I shall refer on this point is that of *Dana v. The Bank of the United States*, (5 *Watts & Serg. Rep.* 223,) which came before the supreme court of Pennsylvania in 1843. There the late Bank of the United States, incorporated by the state of Pennsylvania, had made an assignment of a large amount of its real and personal estate to trustees in trust for the payment of preferred creditors; and the assignment was held to be valid, after a very full and elaborate argument of the case by some of the ablest counsel in the union.

Whether it is expedient that a corporation which has so conducted its affairs as to become insolvent, should have the power, by a general assignment, to appoint its own administrators, or whether an insolvent individual ought to have power to appoint his own assignee, and to give preferences, are questions which belong to the legislature and not to the courts to determine. But as the law now stands, I must hold that this religious corporation, under the sanction of the order of the vice chancellor, had the power to make the assignment in question; and that such assignment conveyed the legal title of the corporation to the equity of redemption, in the mortgaged premises, to the appellants. None of the judgments mentioned in the master's report, therefore, were liens upon that equity of redemption at the time of the sale under the decree of foreclosure.

The order of the vice chancellor must be reversed, and the exceptions to the report allowed. And an order must be entered declaring that the whole of the surplus moneys belong to the



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appellants as trustees for the creditors; and directing the same to be paid to them accordingly. But as the respondents were misled by the opinion expressed on the former appeal, to which I have referred, they are not to be charged with costs either upon the reference, or on the argument of the exceptions before the vice chancellor, or with costs upon this appeal.

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## SHEPARD vs. SANFORD and others.

A court of equity will not entertain jurisdiction of a case for the mere purpose of giving a compensation in damages, for an injury sustained by a false representation; where the remedy at law, by an action on the case, is clear and perfect, and where no discovery is asked for, from the defendant.

THIS was an appeal from a decretal order of the vice chancellor of the fourth circuit, allowing the demurrer of the defendant A. Clark, and dismissing the bill as to him; but with leave to the complainant to amend. The substance of the charge in the bill was that Sanford and Clark, two of the defendants, agreed to represent the defendant Campbell, whom they knew to be insolvent, as a responsible person, and as a creditor of theirs to the amount of \$5000; to enable him to defraud the complainant in the purchase of a small farm and a lot of standing wood and timber, on a credit; and that the complainant was in fact defrauded, in the sale of the farm and of the standing wood and timber, by such false representations made by Sanford and Clark. The following opinion was delivered by the vice chancellor.

WILLARD, V. C. The gravamen of the bill in this cause is that the defendants conspired together to cheat the complainant, as follows: that Sanford and Clark should represent Campbell to be a man of pecuniary responsibility, and a creditor of theirs to the amount of \$5000, besides owning other property; that

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Campbell, upon the strength of the representation, should purchase of the complainant, on a credit, 18 acres of standing wood on the complainant's farm in Amsterdam; that he should also purchase of the complainant, on a credit, another farm of 30 acres; that Campbell should withhold payment, whereby the complainant would be the less able to pay a mortgage of \$3000 held against him by another person; that Sanford and Clark would buy in the mortgage and sell the complainant's farm at a forced sale, and buy it in for a small sum, and the three defendants should share in the speculation. In connection with this, Sanford and Clark induced the complainant to trade at their store, on Campbell's account, and the complainant's sons were also induced to trade with them, upon the like terms.

The bill alleged that the complainant, confiding in the assurances of the defendants as to Campbell's responsibility, sold him the 18 acres of wood, on a credit, and also the 30 acres of land to a person appointed by him, and took a bond and mortgage; that the complainant and his sons traded with Sanford and Clark to a large amount, on Campbell's credit; that Sanford and Clark refused to turn the store account with Campbell, but compelled the complainant and his sons to pay them for the same, which they have done; that Campbell was and is insolvent, and that his insolvency was known, at the time, by Sanford and Clark; that the complainant has foreclosed the mortgage on the 30 acres, and bid in the property for about one half the sum for which he sold it, and the balance remains due; and that he has recovered a judgment against Campbell for the wood, and an execution has been returned *nulla bona*, &c. The bill prayed that the defendants, Sanford and Clark, might be decreed to pay the judgment and the sum which should remain due after the foreclosure of the mortgage on the 30 acre lot.

This bill cannot be sustained as a creditor's bill for want of the averments required by the 189th rule. (*See 3 Paige*, 505, and *S. C. 9 Wend.* 548.) It is nowhere averred that Campbell has any equitable interests in the hands of Sanford and Clark, or that they are indebted to him. There may be other

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averments necessary in a creditor's bill which have been omitted. The bill is not brought for a discovery; as an answer on oath is waived. It is for relief only. The whole subject matter was exclusively cognizable at law. The complainant and his sons, by paying up their accounts to Sanford and Clark, have destroyed their remedy either at law or equity for that part of their claim. Had they refused to pay, the bill might have been so drawn as to apply those debts upon their judgment against Campbell. They also had a good defence at law to those accounts.

The fraudulent representation as to the pecuniary responsibility of Campbell, is of legal cognizance purely; unless it is shown that the property fraudulently received came to the hands of Sanford and Clark. In that case they may be treated as trustees of Campbell for the complainant's benefit. The bill indeed alleges that the avails of the wood came to the hands of Sanford and Clark. But it is not set up in such a way as to dispense with the averment required by the 189th rule.

The demurrer must be allowed, and the bill dismissed as to the defendant Clark, with costs; unless the complainant, within 60 days, elects to pay costs and amend his bill.

*H. Fish*, for the appellant. The demurrer, in this case, is to the whole bill. The bill must therefore be taken as true; and the whole case of fraud stated therein is admitted. And if there is any part, either to the relief or to the discovery, to which the defendant ought to have put in an answer, the demurrer, being entire, must be overruled. (*Mitf. Pl.* 172, 174. 1 *Barb. Ch. Pr.* 106, 111. 3 *John. Ch. Rep.* 467. 5 *Id.* 184. 1 *Ves. jun.* 289. 1 *John. Cas.* 429. 2 *Cai. Cas. in Err.* 344.) There is but one general right claimed in the bill, to wit: the right of being relieved against the combined frauds of the defendants. And although several matters are set forth in the bill, all tending to show the combination of fraud, yet in such case a demurrer will not hold, though the defendants have separate and distinct rights. (*Mitf. Pl.* 147, 148. *Cooper's Eq. Pl.* 184.) The ground upon which the vice chancellor based his opinion

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in favor of sustaining the demurrer, was, that the complainant had a remedy at law. No such point was taken before him upon the argument, nor was that point raised by the demurrer. Consequently that question cannot now be raised in this court on appeal. (*Mitf. Pl.* 174, 176. 1 *Barb. Ch. Pr.* 106. *Barton's Eq.* 108. 2 *Ves.* 83. 4 *Paige*, 127. 4 *Cowen's Rep.* 727. 2 *John. Ch. Rep.* 369.) A court of equity has concurrent jurisdiction with courts of law in all cases of fraud. And its jurisdiction in this case, from the matters set forth in the bill, should have been sustained. (6 *Ves.* 174, 182. 13 *Id.* 131. 10 *Id.* 470. 7 *Id.* 19. 9 *Id.* 464. 5 *Id.* 794. 2 *Id.* 122. 2 *Ves. jun.* 295. 1 *Ves. sen.* 98. 1 *Atk.* 126. 2 *P. Wms.* 156. 1 *Mad. Rep.* 23. 3 *Bro. Ch. Rep.* 218. 1 *Burr.* 396. 1 *Mad. Ch.* 257. 17 *John. Rep.* 388. 1 *John. Cas.* 493. 2 *Cai. Cas. in Err.* 39. 4 *Cowen's Rep.* 727. 7 *John. Ch. Rep.* 201. 4 *Paige*, 94. 7 *Id.* 560. 10 *Id.* 340. 1 *Litt. Sel. Ca.* 164. 2 *Harris & John.* 487.)

*D. P. Corey*, for the respondent. The complainant should, but does not, make out a case within the equitable jurisdiction of this court. (1 *Barb. Pr.* 39. *Mitf. Eq. Pl.* 35. *Story's Eq. Pl.* 8.) He shows that his remedy, if he has any, against the alleged fraudulent representations, is ample at law. The bill is *not for discovery*; as an answer on oath is waived, but is *solely for relief* against supposed fraud. And the alleged information and belief that the defendants associated themselves together to defraud the complainant, does not require an answer, even so far as to deny the combinations, &c. (*Potts v. Durant*, 4 *Gwill.* 1351. 1 *Vern.* 416, 'note 1.) Nor can this bill be sustained as a creditor's bill. It has not the necessary and indispensable averments required by rule 189. (3 *Paige*, 505. *S. C.* 9 *Wend.* 548, and 2 *Barb. Pr. p.* 163 to 165.) The bill does not show that the defendant Clark has an *interest* in the subject of the bill; nor is he liable to the plaintiff's demand as an original debtor. (*Cooper's Eq.* 178, 9. 1 *Vern.* 180.) He is a mere witness, and might be called to prove what the bill alleges, as mere belief, took place in his

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presence. The bill states nothing expressly against the defendant Clark; but all is upon information or belief, or both. This is not sufficient to charge him on the ground of fraud, or otherwise, in this suit. (*Cooper's Eq.* 179 to 181, and cases there cited.) Stating circumstances upon information and belief, and then claiming a right to an account and relief against the defendants, or some of them, is insufficient and bad on demurrer. (*Id. ib.* 8 *Ves.* 395, 404, 405.) Alleging that the defendants, Sanford and Clark, or one of them, without stating which, had said or done this, that, or something else, does not entitle the complainant to either *discovery* or *relief against either*. (*Id. ib.* 8 *Ves.* 405.) The bill, as to the defendant Clark, is too loose and uncertain to authorize the complainant to call upon him to answer, or to entitle the complainant to any discovery or relief. (*Coop. Eq.* 181.) The bill is *multifarious*; it contains several matters of distinct or different natures against the defendants *severally*, as to which there is no *privity* alleged. (6 *Paige's Rep.* 22 to 28. 5 *Id.* 65. 2 *Ves.* 323 to 328, 487. 1 *Barb. Pr.* 40.) For the above reasons the bill was properly dismissed as to Clark, with costs, and the decree of the vice chancellor should be affirmed with costs.

THE CHANCELLOR. I think the vice chancellor decided correctly that there was no equity in the complainant's bill as against the defendant Clark; and that his remedy, for the damage sustained by Clark's false representations, was in an action at law. It is true Lord Erskine, in the case of *Clifford v. Brooke*, (13 *Ves. Rep.* 133,) says that such a fraudulent misrepresentation is the subject of an action, *or of a bill in equity*. But he immediately qualifies the expression by adding, "where it is necessary and fit that equity should interpose its concurrent jurisdiction." It may also be remarked that nothing satisfactory upon this question can be extracted from the opinion of Lord Eldon in the case of *Evans v. Bicknell*, (6 *Ves.* 174;) which was cited by the appellant's counsel upon the argument. Upon principle, however, a court of equity ought not to entertain jurisdiction of a case for the mere purpose of giving a com

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pensation in damages, for an injury sustained by a false representation ; where the remedy at law, by an action on the case, is clear and perfect ; and where no discovery is asked for from the defendant.

The decree appealed from must therefore be affirmed, with costs.

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 MONTGOMERY vs. MONTGOMERY.

If the defendant, in a suit by the husband, to annul a marriage on the ground of fraud, is an idiot, the complainant must procure the appointment of a guardian ad litem to appear and defend the suit for the wife.

Where no guardian ad litem is appointed for the defendant, in such a case, the complainant will derive no benefit from the tacit admission of the fraud charged in the bill, arising from the wife's suffering such bill to be taken as confessed against her.

A court of equity will not annul a marriage contract as having been fraudulent, upon the mere admission, by the defendant, of the facts charged in the bill.

A suit to annul a marriage, on the ground that the consent of one of the parties thereto was obtained by fraud, must be brought within six years after the discovery, by the aggrieved party, of the facts constituting the fraud.

The meaning of the provision of the statute relative to suits of that nature, which declares that a marriage may be annulled on account of force or fraud, *during the lifetime of the parties, or one of them*, is not that the suit can be brought at any distance of time after the right to institute it occurred, provided either of the parties is still living, but that the suit can only be brought during the lifetime of the parties, or during the life of one of them, and not afterwards.

The legal presumption is that a child born subsequent to the marriage of its mother, although begotten before that time, is the child of the husband. And the admission by a third person that the child was begotten by him, and not by the subsequent husband of the mother, is not evidence to rebut such legal presumption ; in a suit to annul the marriage upon the ground that the consent of the husband to the marriage contract was obtained by fraud.

THIS case came before the chancellor upon a bill filed by the husband, against his wife, to annul the marriage contract between them, on the ground of fraud. The bill was filed in April, 1846, and stated in substance, that in October, 1834, the complainant, being then nineteen years of age, went to reside

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with his maternal uncle, Ephraim Jones of Johnstown, and continued to live with him until March, 1836; that the defendant, who was the sister of Jones' wife, was residing in the family and continued to reside there during the same time; that about the first of January, 1836, his uncle persuaded him to marry her, by representing to him that she was virtuous and industrious and would make him a good wife, and by concealing from him the fact that she was then enciente; that a short time after the marriage the defendant admitted she was with child by the uncle of the complainant, and that they had conspired together to bring about the marriage, to shield them from the disgrace of a discovery of their adultery; that the complainant immediately ceased to cohabit with her; and that in March, 1836, she was delivered of a child, which was living at the time of the filing of the bill in this cause; that he never had sexual intercourse with her previous to their marriage, but that she was at the time of such marriage pregnant by his uncle, and that she well knew the fact and concealed it from the complainant.

The defendant, who was proved by one of the witnesses to be in a state of apparent idiocy, suffered the bill to be taken as confessed against her; and it was referred to a master to take proof as to the facts and circumstances stated in the bill, and to report the testimony to the court, with his opinion thereon. Jones, the uncle of the complainant, was examined as a witness before the master, and testified that he suggested to his nephew that he had better marry the defendant, and advised him that it was the best thing he could do; that her brother would probably get them a lot of land out west, and that if they got along well together, he, the witness, would see about their having such a lot of land; that she was industrious, and so far as the witness knew, was virtuous and would make him a good wife; that the complainant said he would talk with her on the subject; that afterwards, in pursuance of the advice of the witness and of the inducements which the witness held out to him, the complainant married the defendant; that she was pregnant at the time of such marriage, and was delivered of a child in

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the month of March thereafter ; that after the birth of the child the complainant insisted that it was not his, and left the house of the witness, leaving the defendant and her child there ; and that he had never lived with her afterwards.

A brother-in-law of the last witness testified that the child bore a strong resemblance to him, and that he had charged him with being its father, and with having procured the marriage for the purpose of concealing the fact ; that Jones made no denial, but said it could not now be helped if the public did charge him with it. The mother of the complainant also testified that the parties had not lived together since their separation in March, 1836.

The master reported that in his opinion the allegations in the complainant's bill were proved ; that his assent to the marriage was procured by the fraudulent connivance of the defendant and Jones, the uncle of the complainant ; and that the child mentioned in the bill was not the child of the complainant, but was illegitimate.

*J. A. Spencer*, for the complainant, then moved for a decree annulling the marriage, and declaring the child illegitimate.

THE CHANCELLOR. There are several objections in this case to the granting of the relief asked for by the complainant. His solicitor, who saw the defendant about two years previous to the time of his examination as a witness before the master, testified that she was then in a state of apparent idiocy. If that was the case, he should have procured the appointment of a guardian ad litem to appear and defend this suit for her ; and the complainant cannot obtain the benefit of a tacit admissions of the fraud charged against her in the bill.

Again ; the court does not annul a marriage contract upon the mere admission by the defendant of the facts charged in the bill. And I think the master erred in this case in supposing that the material allegations in the bill were established by the testimony before him. The only facts of importance that are proved are that the defendant was *eniciente* at the time of her



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marriage, late in the fall of 1836, and that she was delivered of a living child in the March following ; that the complainant was probably induced to marry her upon the recommendation of his uncle ; and that he left her immediately after the birth of the child. That uncle does indeed leave it to be inferred that he had not only been guilty of adultery with his sister-in-law, but that he had also been so base and unnatural as to persuade his nephew to marry her, by falsely representing her to be a virtuous woman, when he knew she was with child by himself. But to implicate the defendant in the conspiracy charged in the bill, the witness should have sworn to the facts charged. For, in the absence of any proof to the contrary, the legal presumption is that the child of which the defendant was subsequently delivered was the child of the complainant, although the testimony shows it must have been begotten before the marriage. And as the complainant and defendant had lived in the same family, for more than a year previous to their marriage, there is nothing to rebut the legal presumption on that subject but the tacit admission of Jones ; which admissions, not being upon oath, are not evidence of any thing, as between these parties. Nor can the court safely act upon such admissions. For the necessary result of receiving such evidence to annul a marriage, would be to produce collusion between parties, both of whom were willing to be released from the matrimonial tie. In this case, if the facts are as stated in the complainant's bill, it would have been much more creditable to Jones had he come out at once and done what was in his power to repair the wrong, by swearing to the whole truth, than to leave it as matter of suspicion only. And if this were the only difficulty in the case, I should refer it back to the master to take further testimony ; so as to give this witness another opportunity to swear to the truth of the allegations made in the bill, if they are in fact true.

It appears, however, from the complainant's own showing, that his right to relief was barred by lapse of time when this suit was commenced. The statute under which this bill is filed declares that a marriage may be annulled, on the ground that the consent of one of the parties was obtained by force or

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fraud, *during the lifetime of the parties or one of them.* (2 R. S. 143, § 30.) The meaning of that provision, however, is that the suit can only be brought by the party whose consent has been obtained by force or fraud, or by some person who has an interest in contesting the validity of the marriage, during the lifetime of the parties to the marriage, or during the life of one of those parties, and not afterwards; not that the suit may be brought at any distance of time after the right to institute it occurred, provided either party is still living. The suit to annul a marriage, upon the ground that the consent of one of the parties thereto was obtained by fraud, must therefore be brought within the time limited by law for the commencement of suits in this court. And the fifty-first section of the article of the revised statutes relative to the time of commencing suits in equity, provides that bills for relief on the ground of fraud shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time. (2 R. S. 301.) The complainant was of full age as early as October, 1836; for he was nineteen at the time he came to reside with his uncle, two years previous to that time. And he states in his bill that the defendant admitted the facts constituting the fraud, as charged in the bill, soon after the marriage and previous to his leaving her in the spring of 1836. The six years allowed by law for bringing a suit to annul the marriage, on the ground of the alleged fraud, had expired several years before the filing of his bill. His right is therefore barred by the lapse of time; and his bill must be dismissed on that ground, even if the alleged fraud was now fully established by the proof. It would for that reason be a useless expense to refer the case back to the master to take further testimony in reference to the fraud charged in the bill.

## LOVETT, executor, &amp;c. vs. BULOID and others.

[Followed, 86 N. Y. 301.]

Where a testator, by the residuary clause of his will, gave, devised, and bequeathed to his wife, and to his child or children, all the rest and residue of his estate, share and share alike, and to the heirs of such child or children who might die leaving lawful issue; and in case either his wife or children should die without leaving lawful issue, then the share of such one dying to go and be divided amongst the survivor or survivors of them; *Held* that the limitation over to the survivors of the class was sufficient to show that an indefinite failure of issue was not intended by the testator, but a failure of issue at the death of the first taker; and that the limitation over to the surviving legatees was therefore valid.

*Held also*, that the bequest to the widow, as well as to the children, was absolute in its terms, subject only to the contingency of the death of the legatee without leaving issue surviving.

And two of the testator's daughters having died leaving issue, and leaving their husbands surviving them, *Held further*, that they were entitled to an absolute estate and interest in their respective parts of the testator's residuary property; and that after their deaths, respectively, the same belonged to their husbands; under the provisions of the revised statutes relative to the distribution of intestates' estates.

Where a remainder, after the termination of a particular estate, is limited to certain specified individuals, or to the survivors of them, the court will refer the survivorship to the death of the testator, and not to the termination of the particular estate, where it is necessary to give effect to the probable intention of the testator in providing for the surviving issue of such of the objects of his bounty as may happen to die during the continuance of the particular estate.

But it seems this rule of construction will not be applied to a case where the particular estate is given to a class, with remainder to the survivors upon the death of some of the class without leaving issue.

Where the residuary estate of the testator is given to a class of persons, with remainder in the shares of such of them as die without issue, to the survivors, there is no benefit of survivorship, among the surviving members of the class, as to the share of the one of the class who has died without issue; but the surviving members of the class take their respective portions of that share absolutely.

THIS was an appeal from a decree of the late assistant vice chancellor of the first circuit. The bill was filed by the surviving executor of R. M. Steele, for a judicial construction of certain provisions of the will of the testator. The will was made in 1812, and the property of the testator consisted of personal estate, entirely. After providing for the payment of his debts, and giving to his wife certain specific legacies and the guard

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ianship of his children, he bequeathed his residuary property to his executors and to the survivor of them, as trustees, in trust to convert it into money and invest it upon bonds and mortgages, or in stocks; and to change such stocks and securities as often as they should deem it beneficial to his estate, and to reinvest the money in similar securities or stocks. The testator then disposed of this residuary fund as follows: "And I do hereby give, devise and bequeath to my said wife Isabella, and to my child or children, all the rest and residue of my said estate, share and share alike, and to the heirs of such child or children who may die leaving lawful issue. And in case either my wife or children should die without leaving lawful issue, then the share of such one dying to go and be divided amongst the survivor or survivors of them." He then appointed his wife, and the complainant, and P. Grim, the executrix and executors of his will. In February, 1813, the testator sailed from New-York for Bordeaux, as master of the schooner Rob. But neither he nor the vessel arrived at their port of destination, nor was either of them ever afterwards heard of. In February, 1814, the executrix and executors, assuming that the testator had been lost at sea, proved the will, and took out letters testamentary thereon, from the surrogate of New-York. The testator, at the time of his supposed death, left four daughters surviving him; all of whom were then infants. Grim, one of the executors and trustees, afterwards died; and in 1826, the widow of the testator intermarried with R. Buloid. Isabella, one of the daughters of the testator, married E. Field. Caroline L., another daughter, married W. Walker. Eliza M., the third, married L. Corning; and Emily, the other daughter, married H. W. Olcott. In March, 1838, Mrs. Corning died, leaving her husband and one child, Mary W. Corning, her mother and her three sisters all surviving her. Mrs. Buloid died a few months afterwards, without having reduced her share of the capital of her first husband's estate into possession, and without leaving any issue except the descendants of her first husband; and leaving her second husband surviving her. In 1840, Mrs. Field died, without issue; leaving her husband, her two sisters,

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and her niece Mary W. Corning, the daughter of her deceased sister, surviving her. L. Corning, after the death of his first wife, married again, and died subsequent to August, 1844. By his will, which recited that his daughter Mary W. Corning was sufficiently provided for out of her grandfather's estate, he made his wife his residuary legatee. But it being afterwards suggested that he was probably under a mistake in supposing that his daughter was entitled to the share of the estate of her grandfather R. M. Steele, which would have belonged to her mother if living, the widow of L. Corning, for the purpose of rectifying that mistake, executed to Mary W. Corning a release and assignment of all right and claim to the share to which the mother of the latter, if living, would have been entitled in the estate of R. M. Steele, her deceased father.

The residuary estate of R. M. Steele, invested by the complainant as the acting executor and trustee, and which remained in his hands at the time of the filing of the bill in this cause, was about \$47,000. During the lives of all the daughters of the testator, the annual income of the fund was distributed equally among the four daughters and their mother. But after the death of Mrs. Corning and her mother, and previous to the death of Mrs. Field, the income was divided into four equal shares, with the assent of Mr. Buloid, three of which shares were paid to the three surviving daughters of the testator, and the other share to the father or guardian of Mary W. Corning, for her use. And subsequent to the death of Mrs. Field, such income was divided into three equal shares; two of which were paid to the two surviving daughters of the testator, and the other to the father, or guardian, of Mary W. Corning, for her use.

The bill in this cause was filed in 1845, and the two surviving daughters of the testator with their husbands, and R. Buloid, E. Field, Mary W. Corning, and the executors of her father, were made defendants therein. The complainant, in his bill, after setting forth the facts, as before stated, alleged that various questions had arisen in relation to the construction of the will of the testator, in reference to the disposition of his residu

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ary estate, in the contingent events which had occurred, which rendered it unsafe for him to proceed to the distribution of the fund without the direction of the court. Among other questions which had arisen, were the following: *First*, whether upon the death of Mrs. Buloid, her surviving husband, upon taking out letters of administration upon her estate, was entitled to receive her share of the residuary estate for his own benefit? *Second*, whether Mrs. Field, who died without issue, had a life interest only, or had an absolute title to one fifth of the residuary estate; which devolved upon her surviving husband as her personal representative? *Third*, whether, upon the death of Mrs. Corning, her share of the estate belonged to her surviving husband, so as to authorize his executors to receive it; and if not, whether it could be transferred to the guardian of her infant daughter? *Fourth*, whether the two surviving daughters of the testator were entitled only to the income of their shares for life, or to the possession of the capital, or of any part thereof? *Fifth*, whether Mrs. Buloid's and Mrs. Field's shares, or either of them, fell into the residuary estate upon their respective deaths, and subject to the limitations and provisions of the will relative to the residuary estate; or was vested absolutely in the surviving legatees? *Sixth*, whether Mary W. Corning was to be considered as one of the surviving legatees, and entitled to stand in her mother's place in the distribution of the lapsed shares of Mrs. Buloid and Mrs. Field, if their shares, or either of them, were lapsed?

The bill further stated that each of the surviving daughters of the testator had four children; all of whom, except one, were under fourteen years of age. And the complainant prayed that the rights of the several parties to the residuary estate might be settled, and that he might be permitted to account and pay over the fund in his hands, and be discharged from his trust; he being advanced in life, and having had charge of the estate for more than thirty years.

All the defendants, except Mary W. Corning, who was a minor, suffered the bill to be taken as confessed against them. She put in an answer, by her guardian ad litem. And the

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cause was heard upon pleadings and proofs as to her, and upon the bill taken as confessed as to the other defendants.

The assistant vice chancellor decided that the words, "in case either my wife or children should die without leaving lawful issue," in the residuary clause of the will, referred to the death of the testator, and not to a subsequent dying without issue. He therefore declared and decreed that the widow and the four daughters of the testator having survived him, the residuary estate became vested in them absolutely, in equal shares; that upon the death of Mrs. Buloid her husband became absolutely entitled to one fifth of such residuary estate; that upon the death of Mrs. Field, her husband became entitled to another fifth of the residuary estate, and was entitled to one fifth of the income accrued subsequent to that time; that upon the death of Mrs. Corning, her husband became entitled to her fifth of the residuary estate, and to the income thereof subsequent to her death; that by his will and the assignment and release of his widow, his daughter Mary W. Corning became entitled to that fifth, and to the income thereof both before and after such assignment and release; and that the two surviving daughters, and their husbands in the right of their respective wives, were absolutely entitled to the remaining two fifths of the residuary estate, and to the income thereof from the death of the testator. A reference was directed to a master to take and state the accounts of the complainant upon these principles; and the costs of the complainant and of the guardian ad litem of the infant defendant, were directed to be paid out of the estate.

The defendant Mary W. Corning appealed from so much of the decree as declared that the residuary estate became vested in the widow and the four children of the testator absolutely, upon his death; and from so much thereof as declared that upon the death of Mrs. Field, her surviving husband became entitled to the share of the estate bequeathed to his wife, and to the income thereof subsequent to her death; and from so much thereof as declared and decreed that the several parties were entitled as in the decree was mentioned.

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*C. Edwards*, for the appellant. The appellant, Mary Winslow Corning, is entitled to a whole fifth part of the residuary estate of the testator; being the original share of her mother, the late Mrs. Eliza M. Corning. The dying without issue, in the testator's will, had reference to the time of the decease of a child of the testator, not having any issue living. The infant defendant, Mary Winslow Corning, is also entitled to participate in the share of Mrs. Field, who died without issue. That share should be divided into three parts, and be distributed, one third to Mrs. Walker, one third to Mrs. Olcott, and one third to the defendant, Mary W. Corning. She is thus entitled on the ground of this third being an accruing share; and not subject to survivorship. She would be thus entitled if the court were reduced to a construction of the words of the will. The decree should accordingly give her a full fifth, and one third of Mrs. Steele's fifth. The complainant, as surviving executor, should be directed to account for the same, and its accumulations since the last payment, and he should be directed to hold the same subject to the application of the guardian of the estate of the appellant.

*Geo. T. Strong*, for the respondent. The bill was properly filed by the complainant to obtain the direction of the court; as there were various doubtful questions arising on the will. 1. Is the gift over on the death of any of the residuary legatees without issue valid, or is it void? (*Patterson v. Ellis' Ex'rs.* 11 *Wend.* 259. *Cutter v. Doughty*, 23 *Wend.* 513.) 2. Did the gift over, on the death of Mrs. Buloid leaving no other issue than those by the testator, take effect, or did her share, upon that event, vest absolutely in her representative? (1 *Pow. on Dev. by Jarman*, 178, n. 6. *Webb v. Heaving*, *Cro. Jac.* 416. *Preston v. Eagle*, *Willes' Rep.* 164. *Hearn v. Allen*, *Cro. Car.* 57.) 3. If it did not take effect is Mr. Buloid estopped by his acts or declarations from claiming that share? If not so estopped, as far as the principal is concerned, is he estopped as regards the income which has been distributed? If not so estopped as to the income, is it to be refunded to him out of



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the estate? 4. If the gift over on the death of Mrs. Buloid took effect, was Mary W. Corning entitled to a share of it; or did it go exclusively to those who were literally the *surviving* children of the testator? 5. A similar question arises as to the share which accrued on the death of Mrs. Field. 6. Did the shares which accrued on the death of Mr. Buloid and Mrs. Field, or either of these shares, vest absolutely in the survivors, or will they or either of them, upon the death of any such survivor without issue, go over to the then survivors, in like manner as the original shares? (*Ward on Leg.* 144, 232, 233. *Moore v. Godfrey*, 2 *Vern. Rep.* 620. *Feltham v. Faulkner*, 2 *P. Wms.* 271. *Taylor's Prec. of Wills*, 428, n.) 7. If these shares vested absolutely in the survivors, has Mr. Field, upon taking out letters of administration on the estate of his wife, a right to that part of the estate which devolved to her upon the death of Mrs. Buloid absolutely? (*Clancy, Husb. and Wife.* 12 *Co. Litt.* 351, note 304. *Squib v. Wyne*, 1 *P. Wms.* 378. 2 *R. S.* 75, sub. 29. *Jenkyns v. Fryer*, 4 *Paige*, 47. 2 *Pow. on Dev., by Jarman*, 212.) 8. Did Mary W. Corning take by implication, under the will of her father, the share which belonged to her mother under the will of Mr. Steele? (1 *Pow. on Dev., by Jarman*, 334, 335, and n. 1, 523, 524. *Ward on Leg.* 2, 10. 1 *Ves. sen.* 34.) If not, is it vested in her by the release or assignment of Mrs. Corning? Or is it vested in the executor of Mr. Corning? 9. Are Mrs. Walker and Mrs. Olcott each entitled to the income only of one fifth of the testator's estate during their natural lives? If so, how is the principal to be invested during that time? Or, are they severally entitled to the possession of the principal; and, if so, is any, and what security to be exacted of them for its repayment, if they should die without issue? (*Covenhoven v. Shuler*, 2 *Paige*, 132, 133. *Clarke v. Clarke*, 8 *Id.*, 160. *Fawker v. Gray*, 18 *Ves.* 131.) Is it necessary that any trustee should be appointed, upon the discharge of the complainant?

The complainant was entitled to have an account taken and to be discharged fully and finally upon paying over, under the

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direction of the court, the money in his hands. The bill having been filed properly, and in good faith, the complainant was entitled to his costs out of the estate; (2 *Barb. Ch. Prac.* 328;) including a counsel fee. (*Brymer v. Nickolls*, 2 *Hill's Ch. Rep.* 121. *Warden v. Burts*, 2 *McCord's Ch. Rep.* 76.) And the assistant vice chancellor having made the proper decree in the cause, the decree appealed from should be affirmed with costs.

THE CHANCELLOR. I think the assistant vice chancellor erred in supposing that the dying without issue, in the residuary clause of this will, referred to the death of any of the legatees without issue previous to the death of the testator; and that the testator intended to give to his widow, and to each of his children who survived him, an absolute estate in an undivided share of the residuary fund. Such a construction is wholly inconsistent with other provisions of the will. And if each of the legatees was to take an absolute interest in the share of the fund immediately upon the death of the testator, the special bequest of the residuary fund to the executors, in trust, to invest the same upon bonds and mortgages or in stocks, and to change such stocks and securities, and reinvest the moneys in similar stocks and securities as often as they should deem proper, would be entirely nugatory. For each of the legatees, or the widow of the testator as the testamentary guardian of the minor children, would, upon the assistant vice chancellor's construction of the will, be entitled to demand their several shares of the estate immediately upon the death of the testator; or as soon as the property could be sold and converted into money. On the other hand, if the testator contemplated the contingency of some of the legatees dying without lawful issue subsequent to his death, and only intended to give them a life estate in their shares of the residuary fund in that event, then the trust to invest the residuary fund, so as to secure the capital of the shares of the legatees who might die without issue, for the benefit of the survivors, was not only proper but absolutely necessary.

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Again; the limitation of the residuary fund is to the widow and children, and to the heirs of the child or children who may die leaving issue. And though the word heirs, in this case, at the time of the making of this will, was a word of limitation only, and could not give an interest to the heirs of the children, as purchasers, it still is of some importance, to show that the testator did not intend to give an absolute title to such of the legatees as should die without issue. The limitation over to the survivors of the class, upon the death of any of the legatees without leaving issue, was not restricted to a dying without issue in the lifetime of the testator. Nor was the remainder limited upon an indefinite failure of issue; so as to give the legatee who died without having had any issue, an absolute estate in his share. For the limitation over, to the survivors of the class, is, according to the decision of the court for the correction of errors, in the case of *Anderson v. Jackson*, (16 *John. Rep.* 383,) sufficient to show that an indefinite failure of issue, was not intended by the testator; but only a failure of issue at the death of the first taker. The limitation over to the surviving legatees was therefore valid; and that part of the decree appealed from, which declares that the residuary estate of the testator was vested absolutely in the five legatees, upon the death of the testator, and that the surviving husband of Mrs. Field became entitled to her share and to the income thereof subsequent to her death, is erroneous, and must be reversed.

Where a remainder, after the termination of a particular estate, is limited to certain specified individuals, or to the survivors of them, the court will refer the survivorship to the death of the testator, and not to the termination of the particular estate, where such a construction is necessary to give effect to the probable intention of the testator in providing for the surviving issue of such of the objects of his bounty as may happen to die during the continuance of the particular estate. (*Drayton v. Drayton*, 1 *Dessaix. Rep.* 324. *Stringer v. Phillips*, 1 *Eq. Ca. Abr.* 293. *Moore v. Lyons*, 25 *Wend. Rep.* 119.) It is doubtful, however, whether this rule of construction can

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be applied to a case where the particular estate is given to a class, with remainder to the survivors upon the death of some of the class without leaving issue. For such a construction, although it might give to the issue of one of the class who had previously died leaving issue, a part of the share of another of the class who died without leaving issue, would also give to the collateral heirs, or the personal representatives, of one who had previously died without issue, a part of the share of another who should subsequently die without issue.

Thus, in the case under consideration, such a construction would give to the child of Mrs. Corning, and to the husband of Mrs. Buloid, two-fourths of the share of Mrs. Field, who died in 1840, without issue. And if either of the surviving daughters should hereafter die without issue, the same construction would also give to the husband of Mrs. Field, as her representative, one-fourth of that share. It is evident, therefore, that such a construction would be wholly inconsistent with the intention of the testator.

I have no doubt that if the testator had contemplated the event of one of his children dying without issue, subsequent to the death of another child who had left issue, he would have provided for that case, by giving such issue a share with the surviving children. But there is no probability that he would, intentionally, have inserted a provision in his will, the effect of which would be to give to the second husband of his widow, after her death, a part of the share of one of the children who had survived her. The language of the will, however, has not given any portion of Mrs. Field's share to the issue of her deceased sister. It must therefore be distributed equally between the two surviving sisters of Mrs. Field. And there is no benefit of survivorship as to that part of the fund, even if one of those sisters should hereafter die without leaving any issue surviving her. They therefore became absolutely entitled to that portion of the trust fund, immediately upon the death of Mrs. Field; under the limitation in the will to the survivors.

It is difficult to say what the testator could have intended by limiting over the share of his wife to the survivors of the class

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in case she should die without leaving issue. For, whether she died before or after the testator, she could not die without leaving issue, if either of the testator's children, or any of their descendants, survived her; unless the testator had some children by a former marriage, at the time of making his will, who are now dead. The bequest to the widow, as well as to the children, is absolute in its terms; subject only to the contingency of the death of the legatee without leaving issue surviving. And there is nothing in the will restricting either of the legatees to a mere life estate in their respective shares of the residuary property of the testator, except upon the happening of such a contingency. In the events which have occurred, therefore, Mrs. Buloid and Mrs. Corning, both of whom died leaving issue, were entitled to the whole estate and interest in their respective fifth parts of the testator's residuary property. And upon their deaths respectively, the same belonged to their husbands; under the provisions of the revised statutes relative to the distribution of intestate estates. The appellant, therefore, under the assignment from the residuary legatee of her father, is entitled to one fifth of the residuary estate of her grandfather; and to the income thereof, except the income which had been paid over to her father, or to her mother during the lifetime of the latter. And the complainant, by the decree, must be directed to pay over that fifth of the estate to her, or to her general guardian, if she is still a minor, and the income thereof which has not already been paid to her father or guardian.

Although the defendant, R. Buloid, makes no claim to his late wife's one fifth of the residuary estate of the testator, he is legally entitled to it, and to the income which has not been paid over by the complainant, to the other legatees, with his assent. And if he does not wish to receive and retain it on his own account, he still may dispose of his interest therein between the two surviving daughters of the testator and the daughter of Mrs. Corning, so as to make their respective shares in the estate equal; as the testator himself probably would have done if he had contemplated the events which have occurred.

The shares of Mrs. Walker and Mrs. Olcott are still subject

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to the right of survivorship between themselves, if either of them should hereafter die without leaving issue surviving her. But that contingency is very remote, as each of them has four children. And the chances of survivorship being equal, they and their husbands can give a valid consent that the complainant may pay to each her share of the estate; so that such complainant may be discharged from his trust.

The decree of the assistant vice chancellor must be reversed and modified in the parts appealed from, in conformity with this decision; and must declare the rights of the parties accordingly. And the costs, both of the appellant and the respondent, upon this appeal, must be paid out of the estate of the testator in the hands of the complainant.

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WAKEMAN and SKINNER, executors, &c. vs. HAZLETON  
and wife.

Where a bill was filed to foreclose a mortgage, which was a valid lien upon premises worth the whole amount due on such mortgage, including costs of foreclosure, but owing to the ignorance or carelessness of the person employed to foreclose the mortgage, a subsequent purchaser, of the mortgaged premises, from the mortgagor, was not made a party, and the bill having been taken as confessed against the mortgagor, a decree of foreclosure and sale was entered, and the premises were sold, for less than one third of the amount due upon the mortgage, to a person who transferred his bid to the owner of the equity of redemption; *Held* that the decree for a foreclosure and sale was a mere nullity, so far as the rights of the owner of the equity of redemption were concerned; and that it was a proper case for setting aside such decree, and the sale under it, and for granting leave to amend the bill, upon the application of the complainants, on terms.

Where executors employ a person not authorized to practice, to foreclose a mortgage due to the estate of their testator, and he forecloses the same in the name of another person, as solicitor, but from the ignorance of the person so employed by the executors, the mortgage is irregularly foreclosed, so that a part of the debt is lost, such executors are answerable to the legatees for the amount of such loss.

*It seems* that if a person not legally authorized to practice law is employed to conduct judicial proceedings, he is not legally responsible to his employer for any loss the latter may sustain in consequence of the ignorance of the person so employed, in respect to legal proceedings.

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Wakeman v. Hazleton.

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THIS was an appeal from an order of the late vice chancellor of the seventh circuit, denying an application of the complainants for a resale of mortgaged premises, and for other relief. James Skinner, deceased, appointed the complainants his executors, and authorized them to sell his residuary estate and to divide the proceeds thereof among his legatees. They sold a farm in Seneca county, which belonged to their testator's estate, to the defendant E. Hazleton, and took back from him a bond and mortgage for a part of the purchase money. Hazleton afterwards became insolvent and conveyed the mortgaged premises to W. Clark, his father-in-law. The mortgage not being paid, the complainants employed M. S. Hunting, who was not authorized to practice in chancery, to foreclose the same. He filed the bill in this cause, in the name of a solicitor residing in an adjoining county, to foreclose the mortgage. And, either through ignorance, or for some other cause which is not explained, he neglected to make Clark a party to the suit; although at the time of the filing of the bill, or within a few days thereafter, he was informed that the mortgagor had conveyed all his interest in the premises about a year before, and that Clark was the sole owner of the equity of redemption at the time of the commencement of the foreclosure suit. Hazleton made no objection to the suit upon that ground, but suffered the bill to be taken as confessed; and the usual decree of foreclosure and sale was entered, in the same manner as if he was still the owner of the premises. At the time of the master's sale there was about \$1800 due upon the bond and mortgage, and the mortgaged premises were worth considerably more than the amount of the debt and costs. Hazleton and Clark allowed the premises to be struck off to the husband of one of the legatees, for \$600. Clark immediately afterwards insisted upon his right to redeem the premises, upon payment of the amount of the bid, on the ground that he had not been made a party to the suit; and he induced the purchaser to relinquish the purchase to him for that sum.

The complainants thereupon applied to the vice chancellor to set aside the sale, and for leave to amend their bill by making Clark, the owner of the equity of redemption, a party to

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the suit ; and for such other relief as might be proper under the circumstances of the case. The vice chancellor denied the motion with costs. He however directed Clark to pay to Ruth Smith, one of the legatees, who was an infant at the time of the master's sale, such a sum as would be equal to her share of the amount which was due upon the bond and mortgage. But he made no provision for the payment of what was due to the other legatees, out of the moneys secured by the bond and mortgage ; or for indemnifying the complainants against their liability to those legatees for the loss which would be sustained by the negligence of such complainants as executors, in case the sale was permitted to stand.

*A. Gibbs*, for the appellants.

*E. F. Smith*, for the respondent.

THE CHANCELLOR. It is very evident in this case that if any thing is lost upon the bond and mortgage given to the executors, it will have been occasioned by their negligence in employing a man to foreclose the mortgage, in chancery, who was not authorized to practice, and who suffered the premises to be sold under a decree which was a mere nullity, so far as the rights of the owner of the equity of redemption were concerned. For under such a foreclosure there is no presumption that the mortgaged premises were sold for their value. Nor were the legatees who were adults bound to attend and bid upon the premises, upon a sale under such a decree, for the purpose of preventing a sacrifice of the property. There being no valid foreclosure, the legal effect of the proceeding is the same as if the executors had assigned this bond and mortgage to Clark for \$600 ; when the mortgage was a valid lien upon premises which were worth the whole amount due, including the necessary costs of a proper foreclosure. I do not see any thing, therefore, to protect the executors from personal liability to the legatees in case this sale is permitted to stand. And as Hunting was not an officer of this court, authorized to foreclose the bond and mortgage here



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it is more than doubtful whether the complainants could recover against him for his gross neglect in failing to have the mortgage properly foreclosed. I think also, from the facts stated in the papers which were before the vice chancellor, that Hazleton, and Clark his father-in-law, must have been aware of the legal defects in the foreclosure of the mortgage; and that they intentionally suffered the premises to be struck off to Smith, for a small sum, for the purpose of obtaining the property without paying the amount justly due upon the bond and mortgage. The complainants, on the other hand, even if they were aware of the fact that Clark had not been made a party to the foreclosure suit, could not have understood the legal effect of the proceeding, or they would not have allowed the property to be sold under the decree for less than one third of the amount actually due. I think, therefore, that justice to all parties required that the vice chancellor should grant relief; where it could have been done without any injury whatever to Clark, the owner of the equity of redemption in the mortgaged premises. The sale, as well as the imperfect decree under which it was made, should have been set aside upon terms; unless Clark thought proper to pay the balance due upon the decree.

The order appealed from must therefore be reversed. And unless Clark thinks proper, within sixty days after the entry and service of the decretal order upon this appeal, to pay the complainants the balance due upon the decree, after deducting therefrom the amount which he has already paid to Ruth Smith for her share, with the interest thereon, the master's sale and the decree under which it was made, and all proceedings in the suit subsequent to the taking of the bill as confessed against the defendants, are to be set aside; upon the complainant's refunding to Clark the \$600, and the amount paid to Ruth Smith, with interest on those two sums from the times they were paid. And the bill in that case must be amended by making the owner of the equity of redemption a party to the suit. If Clark does not pay the balance due upon the decree within the time above specified, the complainants are, within sixty days thereafter, to pay the amount of the bid at the master's

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sale and the money paid to Ruth Smith under the vice chancellor's order. And if they neglect to pay or to tender it to Clark or to his solicitor, within the sixty days, their motion is to be denied with costs.

Neither party is to have costs as against the other upon this appeal.

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PARSONS vs. MUMFORD and others.

M. being the owner of a farm, in January, 1838, mortgaged the same to R. to secure the payment of \$6000 and interest. In June thereafter he again mortgaged it to P. the complainant, to secure the payment of \$7000 and interest. In March, 1842, he gave to P. an absolute deed of the premises, and at the same time assigned to him his interest in two previous mortgages thereon; and took back from P. an instrument, not under seal, certifying that he had received such conveyance and assignment, and was to sell and dispose of the farm in such lots, tracts, or parcels, and for such price, and upon such terms, as he might deem expedient; and was to apply the proceeds of such sales, &c. to the payment of M.'s bond and mortgage to himself, and to the payment of the prior bond and mortgage to R.; and pay the surplus, if any, to M. And if it should be necessary or expedient, to foreclose either of the two last mentioned mortgages, to perfect the title to the premises, the costs of the foreclosure were to be paid, as part of the necessary expenses of the execution of the trust. Subsequently P. filed a bill to foreclose the mortgage given to him by M. and obtained the usual decree for foreclosure and sale, with a decree over against M. for the deficiency, if any. At the master's sale, the premises were bid in by P. for the sum of \$200, subject to the prior mortgage to R.; leaving a deficiency, due upon the decree, of \$8355.59; for which amount the decree was docketed against M. the mortgagor. P. went into possession of the premises and received the income thereof, kept down the interest upon the prior mortgage, and paid the taxes; but the income was insufficient for that purpose. On a bill filed by P., praying that the balance due to him upon his own bond and mortgage, and the interest which he had paid upon the prior bond and mortgage beyond the income of the premises might be ascertained; that the premises might be sold; that he might be permitted to bid at the sale, for the protection of his rights, &c.; and might be permitted to enforce his former decree for the deficiency; *Held* that this was a case in which the complainant was entitled to relief; and a demurrer to the bill was overruled.

*Held also*, that taking the whole transaction together—the conveyance from M. to P., and the written defeasance, and the subsequent purchasing in of the premises by

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P., at the master's sale—it must be considered merely as a further security of the debt due to P., and that the interest of P. in the premises was in the nature of a mortgage merely.

*Held further*, that P.'s interest in the premises was subject to an equity of redemption in M., and was not strictly a trust which could enable P. to convey a good title to a purchaser who was acquainted with the facts of the case.

THIS was an appeal from a decree of the vice chancellor of the eighth circuit, allowing a demurrer of the defendant W. W. Mumford, and dismissing the complainant's bill as to him. W. W. Mumford, being the owner of a farm in the county of Monroe, mortgaged it to Robert Ray, in January, 1838, to secure the payment of \$6000 and interest. And in June of the same year, he again mortgaged it to E. M. Parsons, the complainant, to secure the payment of \$7000 and interest. On the 22d of March, 1842, Mumford gave to the complainant an absolute deed of the premises; and at the same time assigned to him his interest in two previous mortgages upon the premises, and took back from him an instrument, not under seal, certifying that he had received such conveyance and assignment from Mumford, to sell and dispose of the farm in such lots, tracts or parcels, and for such price, and upon such terms, as to payment, as Parsons might deem expedient; and to apply the proceeds of such sales, and the moneys to be received upon the assigned bonds and mortgages, to the payment of the bond and mortgage given by Mumford to him, upon the premises, and to the payment of the prior bond and mortgage to Robert Ray; and to pay the surplus, if any, to Mumford. The instrument given back to Mumford, by the complainant, also stated that if it should be necessary or expedient to foreclose either of the two last mentioned mortgages, to perfect the title to the premises, the costs of such foreclosure were to be paid, as part of the necessary expenses of the execution of the trust.

A few days after the receipt of this conveyance by Parsons, and the giving of such written instrument by him, he filed a bill to foreclose the mortgage given to him, upon the premises, by Mumford, in June, 1838, and making the mortgagor one of the defendants therein; in which foreclosure suit the usual decree

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for the foreclosure and sale of the premises was obtained ; with a decree over against Mumford for the deficiency in case the premises should not sell for enough to pay the debt and costs. Upon the master's sale, in December, 1842, the premises were bid in by the complainant for the sum of \$200, subject to the prior mortgage to R. Ray ; leaving a deficiency due to the complainant of \$8355.59, as reported by the master. And upon the confirmation of the master's report, a decree was docketed against Mumford for that amount. The complainant went into possession of the premises and received the income thereof, kept down the interest to Ray, the prior mortgagee, and paid the taxes ; but the income was wholly insufficient for that purpose. He had also advertised the premises for sale, and had endeavored to sell the same without success.

He thereupon filed his bill in this cause stating these facts, and praying that the balance due to him upon his own bond and mortgage, and the interest which he had paid upon the prior bond and mortgage, beyond the income of the premises, might be ascertained, and that the premises might be sold by a master, under the direction of the court ; and that he might be permitted to bid at the sale, for the protection of his rights, &c. and be permitted to enforce his former decree for the deficiency, for the balance which might be found due. The following opinion was delivered by the vice chancellor.

F. WHITTLESEY, V. C. The complainant, before he commenced his proceedings to foreclose his mortgage, received a deed of the mortgaged premises from the mortgagor. It would seem that this deed was executed in pursuance of an agreement between the parties, by which the mortgagee was to have power to sell the premises at his discretion as to quantity, price, and terms of payment, and to apply the proceeds to the payment of the two mortgages. This conveyance gave the complainant, as against the mortgagor, full control and power over the mortgaged premises, to dispose of the same. The only object of the foreclosure was to perfect the title as against others. And the master's deed only added strength to the complainant's title,

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which was still subordinate to the agreement. The title was in fact acquired by the complainant under an agreement, with the mortgagor, by which, it may be remarked, the complainant received other securities than the mortgaged premises. Under this agreement, the complainant could not sell any of the mortgaged premises and become himself the purchaser, freed from the operation of the trust. The scope and effect of the agreement was that the complainant should not become an absolute purchaser. The whole scope of the present bill is to release the complainant from this operation of the agreement, and enable him to purchase absolutely for himself, under a decree of sale which he asks to have made. This is, in other words, to ask the court to vary the agreement made by the parties themselves, and relieve one party from a part of the agreement which is onerous to himself, or deemed to be so; and this after he had derived certain advantages from the agreement. The complainant has, without any authority of this court, and by virtue of the agreement, the right to sell the premises in such parcels and upon such terms as to price and payment as he thinks proper. Indeed, he can do all under the agreement that the court could by decree authorize him to do, except to become the absolute purchaser himself, at any sale to be made. This he asks, by his bill, to be authorized to do, upon the allegation that after advertising he cannot find purchasers. The court certainly cannot find him purchasers; and a master's advertisement of sale for cash would hardly be so likely to draw purchasers at fair prices as the trustee's advertisement of sale upon favorable terms of credit. If the complainant was suffered to purchase, at any such sale, he would still have the property; his debt would not be paid in cash, and he would have to sell the property to realize his debt in cash. But in such a case, if he sold it at an advance from his bid, he would be entitled to the increased price himself. This, it would seem, it was the object of the agreement to prevent, and the bill cannot be sustained. The demurrer is allowed, and the bill dismissed with costs.

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*E. Griffin*, for the appellant. The complainant had a right to file his bill in chancery, asking to have the trust property sold under the direction of this court. (*Mitf. Pl.* 134, 5. 1 *Ch. Ca.* 249. 1 *Sim. & Stu.* 255.) The complainant, as such trustee, may be permitted to bid, at the sale of the premises, unless the court is satisfied that the cestui que trust will be injured. (3 *Paige*, 179. 2 *John. Ch.* 261.)

*W. W. Mumford*, for the respondent. The proceedings in the prior foreclosure suit are a bar to this action. The complainant has mistaken his remedy, if any he has. He should have presented his *petition* in the former suit, instead of filing a *new bill*. There is no equity in the complainant's bill, because, (1.) The complainant is clearly a *trustee*. He accepted the trust voluntarily; and cannot be released from the duties and responsibilities of a trustee without the consent of the cestui que trust. (2.) He has now full and absolute control over the subject matter of this suit; and can sell and dispose of the property (as he is legally and equitably bound to do) without the interference or aid of this court. (3.) He asks this court to set aside a solemn contract between these parties, which has been already executed on the part of the defendant, and to make a new contract for them, without the assent, and against the interests, of the defendant. (4.) The bill clearly shows an original and continued breach of good faith and of legal obligation on the part of the complainant, injurious to the rights, and destructive of the interests of this defendant, in the premises: 1. By causing a decree to be entered for a deficiency, when *non constat*, that there would be any deficiency: and 2. In delaying sales of the property, or of some part or portion thereof, whilst he was at the same time wasting the profits and accumulating interest and expenses against it.

THE CHANCELLOR. I think this was a case in which the complainant was entitled to relief, and that the demurrer should have been overruled. If the agreement of the complainant of the 22d of March, 1842, had not shown that both parties

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contemplated a nominal foreclosure of the complainant's mortgage, for the purpose of vesting the title absolutely in Parsons, to enable him to sell and pay himself and the prior mortgagee, that foreclosure would have been conclusive between the parties; so as to vest the title to the premises absolutely in the complainant, for his own benefit, subject only to the prior mortgage from Mumford to R. Ray. But when that foreclosure is taken in connection with the agreement, it would be unjust to Mumford to consider all his equity of redemption and interest in the premises as cut off by such foreclosure and sale. And it would be equally unjust and unconscientious, to permit Mumford to consider his debt to the complainant as extinguished by the sale, so that the complainant could get no payment except what he might obtain by a sale of the premises. It is evident, therefore, that in the situation in which the premises are, they cannot be sold in parcels, as contemplated by the parties; as no prudent man would purchase a part of the farm subject to the payment of the large mortgage thereon to Ray. Taking the whole transaction together—the conveyance and written defeasance of March, 1842, not under seal, and the subsequent purchasing in of the premises at the master's sale—it must be considered merely as a further security of the debt due to the complainant; and that the interest of Parsons in the premises is now in the nature of a mortgage merely. The complainant's interest in the premises, therefore, is subject to an equity of redemption, in Mumford, and is not strictly a trust which will enable the complainant to convey a good title to a purchaser acquainted with the facts of the case.

The amount justly due to the complainant should be ascertained, and a decree of foreclosure and sale of the premises should be made, containing the usual authority to any of the parties in the suit to bid at the sale, &c. The decree of the vice chancellor must therefore be reversed; and the demurrer must be overruled, with costs. And the respondent must pay those costs, and put in his answer, within twenty days after service of a copy of the taxed bill of costs, or the complainant's bill in this cause must be taken as confessed as against the respondent

## Nelson and others, appellants, vs. McGiffert, respondent.

[Approved, 56 How. 129.]

Where one of the subscribing witnesses to a will swears that all the formalities required by the statute were complied with, on the execution thereof, the will may be admitted to probate; notwithstanding the other subscribing witnesses may not be able to recollect the fact.

Where the attestation clause of a will states that the will was signed, sealed, and published by the testator, as his last will and testament, in the presence of the attesting witnesses; who, *at his request*, and in his presence, subscribed their names as witnesses thereto, this, after a considerable lapse of time, and when it may reasonably be supposed that the particular circumstances attending the execution of the will have escaped the recollection of the attesting witnesses, is a circumstance from which the court, or a jury, may infer that these requisites of the statute were complied with.

In the execution of wills, the statute does not require any particular form of words to be used by the testator, either in the admission of his signature, in the publication of the instrument as his will, or in the communication to the witnesses of his request or desire that they should subscribe their names to the will as attesting witnesses to the fact of its due execution by him. It is sufficient if the formalities required by the statute are complied with in substance.

A declaration by a testator, made five years after the execution of a will by him, and when he was about to execute another will, that he had been influenced to make a former will in which he had not done justice to his grandchildren, is not sufficient to authorize the court to reject the probate of the former will, which was duly executed, when the testator was in the possession of his mental faculties, and entirely free from restraint.

Upon the proving of a will, before the surrogate, he has jurisdiction and power to receive proof that such will was revoked by a subsequent will of the testator; and that such subsequent will has been fraudulently destroyed, or that it was destroyed by the testator when his mind had become so far impaired that he was incompetent to perform a testamentary act.

But the chancellor alone has the power to take proof of the will, which was thus destroyed, for the purpose of establishing it as a testamentary disposition of the property of the decedent.

In resisting the probate of an instrument propounded as the last will and testament of a decedent, his heirs and next of kin have the right to introduce any testimony which will be sufficient to satisfy the surrogate that the instrument propounded was not in force, as a valid will, at the death of the testator named therein.

A subsequent will does not revoke a former one, unless it contains a clause of revocation, or is inconsistent with it. And where it is inconsistent with the former will, in some of its provisions merely, it is only a revocation *pro tanto*.

Where a subsequent will has been made, and there is no evidence that it contained any clause revoking a former will, as in cases where the contents of the last will cannot be ascertained, it is not a revocation of the former will.



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THIS case came before the chancellor upon an appeal from the decision of the circuit judge of the third circuit, made upon an appeal to him from the sentence and decree of the surrogate of the county of Columbia, establishing an instrument propounded as the last will and testament of James Nelson, deceased, as a valid will of the real and personal estate of the decedent. The will was made in July, 1832, when the testator was between seventy and eighty years of age. And it was propounded for probate in October, 1840, a few weeks after the testator's death, by his son-in-law, J. McGiffert, one of the executors named therein, and whose wife was the principal legatee and devisee. The instrument propounded contained an attestation clause, stating the execution and publication of the instrument by the testator, as his last will and testament, in the presence of the subscribing witnesses, who, in the presence of the testator, and at his request, and in the presence of each other, subscribed their names thereto as witnesses. It was attested by three witnesses, all of whom were produced, and examined before the surrogate. Upon their direct examinations all the subscribing witnesses testified to the execution and publication of the will by the testator, and that he was of sound mind, and that all the witnesses attested the instrument in the presence of the testator and at his request. The first witness, M. Hoyt, upon his cross-examination, stated that the testator and McGiffert, his son-in-law, came to the witness, and when the other subscribing witnesses were present, but he could not distinctly recollect whether the testator or McGiffert, the son-in-law, requested him to witness the will, or whether either of them requested the other two gentlemen to do so. This witness, however, had a vague recollection of being asked by McGiffert to witness the will; and there seemed to be a perfect understanding between the testator and McGiffert upon the subject. Voorhees, the next subscribing witness, stated upon his cross-examination, that he could not say positively whether it was the testator or McGiffert who asked him to witness the instrument, or whether it was either of them; but he had an impression that it was McGiffert who called him in, as he was

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passing the store of Hoyt, and requested him to be present at the execution of the will. Lyon, the other subscribing witness, said nothing on his cross-examination to weaken the force of his testimony on his direct examination; but he testified that he and the other subscribing witnesses signed their names as witnesses at the request of the testator, and in his presence. The last mentioned witness further stated that after the will had been executed, witnessed, and published, the testator took it and carried it home with him.

The parties opposing the will then introduced evidence for the purpose of showing that the instrument propounded had been revoked by a subsequent will of the testator, made in May, 1837. No such will was found at the death of the testator, or produced before the surrogate; and the counsel for McGiffert insisted that the surrogate had no authority to receive evidence of the making of a subsequent will, which was not produced; for the purpose of showing a revocation of the former will. But the surrogate decided that the testimony was proper. General Bogardus, the attorney who drew the will of 1837, then testified to the due execution of such a will, and that it was witnessed by himself and by another competent witness, whose name he did not recollect, though he was acquainted with him when he witnessed the will; and that all the forms required by the law were complied with. The other subscribing witness to the will of 1837 was also called and examined, and he likewise proved the due execution thereof. Neither of the witnesses, however, stated the provisions of that will, nor whether it contained a clause revoking all former wills. The will of 1837 was enclosed in an envelope by the testator and sealed up; and was placed in a trunk containing deeds and other papers of the testator, and was delivered by him to J. Tait to be kept for him. And in 1838 the trunk containing the will of 1837, and other papers, was delivered to McGiffert, the son-in-law, upon an order signed by the testator, and upon a receipt given by McGiffert to Tait for the trunk and papers thus delivered to him. McGiffert then produced in evidence the receipt of the testator, stating that he had received the trunk

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and papers from McGiffert, with the will and codicil, &c. which had been deposited with Tait. That receipt concluded as follows: "The will and codicil above referred to I have this day destroyed; and my intention in so doing is to revive and give effect to my first will, which I made in 1832, and deposited with my son-in-law, Jas. McGiffert, one of the executors therein named.

JAS. NELSON."

The surrogate decided in favor of the validity of the will of 1832, and allowed it to be recorded as a valid will of real and personal estate; and the circuit judge affirmed the decision, upon an appeal to him. The parties contesting the will thereupon appealed to the chancellor.

*H. Ketchum*, for the appellants. The writing admitted to proof by the surrogate, as a will, was not sufficiently proved; because the attesting witnesses did not sign their names at the request of the testator. The testator was under undue influence when he executed the will. The writing admitted to proof, was not the last will and testament of the testator, because a subsequent will was made; and there was no legal proof that the last will was destroyed, so as to give effect to the first will. (2 *R. S.* 66, § 53. 2 *Id.* 64, § 54.)

*H. Hogeboom*, for the respondent. The will of 1832 is a legal and valid will, and has been duly proved. The testator's declaration that he had been influenced to make a former will is improper evidence; is indefinite; does not imply restraint, and is overruled by the other testimony. The will of 1836 did not revoke or cancel the will of 1832. All evidence to show the execution of the will of 1836, without producing it or proving its loss, absence or destruction, was premature and improper at any rate until the introduction of the paper of April 23, 1838. (9 *Cowen*, 208. 4 *Id.* 483.) The evidence as to the will of 1836, admitting its absence to be accounted for, was incompetent and improper; because it was not shown to have been in existence at the death of the testator, nor fraudulently destroyed in his lifetime; nor were its provisions proved by two witnesses

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(2 *R. S.* 12, § 74.) It is only in such cases that a will can be proved as a lost or destroyed will, and then only in the court of chancery. (2 *R. S.* 12, § 70.)

The execution of the will of 1836, in the manner required by the revised statutes, was not fully established. (2 *R. S.* 7.) The execution of a second will is not of itself, and necessarily, a revocation of a former one. (3 *Stark. Ev.* 1713. 2 *Phil. Ev.* 195. *Brant v. Wilson*, 8 *Cowen*, 56.) There is no evidence that the will of 1836 contained a clause revoking former wills, or that its provisions were inconsistent with those of the will of 1832. (3 *Stark. Ev.* 1712. 1 *R. L.* 365, § 3. 2 *R. S.* 8, § 42. *Id.* §§ 47, 48.) If the will of 1832 was revoked, by the will of 1836, it was subsequently revived and re-established. The destruction of a will is a revocation thereof. The fact of a revocation may rest in parol as well as in writing. (4 *Kent's Com.* 532. 2 *R. S.* 9, § 53.)

THE CHANCELLOR. The execution of the will of July, 1832, was sufficiently proved, to entitle it to be recorded as a valid will of real and personal estate. It is true, the subscribing witnesses, after the lapse of eight years, did not all recollect whether they attested the execution of the will at the request of the testator, or at the request of McGiffert, the son-in-law, who was present at the same time. And one of them had a vague impression that it was McGiffert that requested them to subscribe the will as witnesses. One of the attesting witnesses, however, swore positively that they all attested the execution of the will at the request of the testator, and in his presence. And there was nothing drawn from that witness, on his cross-examination, to induce a belief that he entertained any doubt as to the facts which he swore to, on his direct examination. And where one of the subscribing witnesses to a will swears that all the formalities required by the statute were complied with, the will may be admitted to probate, notwithstanding the other subscribing witnesses may not be able to recollect the fact. (*Jauncey v. Thorn*, 2 *Barb. Ch. Rep.* 41.) Again; the attestation clause stated that the will was signed, sealed, and

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published by the testator as his last will and testament, in the presence of the attesting witnesses; who, *at his request*, and in his presence, subscribed their names as witnesses thereto. This, after a considerable lapse of time, and when it may reasonably be supposed that the particular circumstances, attending the execution of the will, have escaped the recollection of the attesting witnesses, is a circumstance from which the court or a jury may infer that these requisites of the statute were complied with. In this case, too, all the witnesses testify to facts from which it may fairly be inferred that they attested the execution of the will in conformity to the wishes of the testator. For he went with his son-in-law to the store of one of the subscribing witnesses, with the will already prepared and ready for execution; apparently for the sole purpose of having it executed in the presence of such witness, and in the presence of others who were acquainted with the testator. And there is no pretence that the testator was not perfectly competent to make a valid will, and to understand the nature of the act he was about to perform. Not only the witnesses, but the testator himself, must therefore have understood that they were witnessing the execution of the will, in conformity to his desire and wish; although he may not have said in terms, "I request you and each of you to subscribe your names as witnesses to this my will." If such a formal request was necessary to be proved, in all cases, and the witnesses were required to recollect the fact, so as to be able to swear to it after any considerable lapse of time, not one will in ten would be adjudged to be valid. In the execution of wills the statute does not require any particular form of words to be used, by the testator, either in the admission of his signature, in the publication of the instrument as his will, or in the communication to the witnesses of his request or desire that they should subscribe their names to the will as attesting witnesses to the fact of its due execution by him. But it is sufficient if the formalities required by the statute are complied with in substance.(a)

There is nothing in the testimony in this case which could

(a) See *Seguine v. Seguine*, (2 Barb. Sup. Court Rep. 385, S. P.)

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justify the court in rejecting the will of 1832, upon the ground that the testator had been induced to execute it by fraud or undue influence. The evidence relied on to prove that the will was obtained by undue influence, is the testator's declaration, made about five years afterwards, and when he was about to execute another will, that he had been influenced to make a former will, in which he had not done justice to his grandchildren. Such a declaration is wholly insufficient to authorize the court to reject the probate of a will duly executed, when the testator was in the possession of his mental faculties and entirely free from restraint.

The only remaining questions are as to the due execution of the subsequent will of 1837, and its effect upon the will of 1832. There is no doubt as to the jurisdiction and power of the surrogate to receive proof that the will of 1832 was revoked by a subsequent will of the testator, and that such subsequent will had been fraudulently destroyed ; or that it was destroyed by the testator when his mind had become so impaired that he was incompetent to perform a testamentary act. The chancellor alone had the power to take proof of such a will for the purpose of establishing it as a testamentary disposition of the property of the decedent. But in resisting the probate of the instrument propounded by McGiffert as the last will and testament of the decedent, the heirs and next of kin had the right to introduce any testimony which would be sufficient to satisfy the surrogate that the instrument propounded was not in force as a valid will at the death of the testator named therein.

The evidence of the witnesses on the part of the appellants, in this case, fully established the fact of the due execution of a testamentary paper by the decedent in 1837. But the appellants entirely failed in showing that it was a revocation of the will of July, 1832, or that it was inconsistent with that will, in any respect. Neither of the witnesses says any thing as to the contents of the testamentary paper of 1837 ; or that it contained any clause revoking the will of 1832, or any part thereof. A subsequent will does not revoke a former one, unless it contains a clause of revocation, or is inconsistent with it. And

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where it is inconsistent with the former will in some of its provisions merely, it is only a revocation *pro tanto*. (*Braxt v. Wilson*, 8 *Cowen's Rep.* 56.) Where a subsequent will is made, and there is no proof that it contained any clause revoking a former will, as in cases where the contents of the last will cannot be ascertained, it is not a revocation of the former will. This was decided by the court of king's bench, in England, more than one hundred and fifty years since, in the case of *Hutchins, lessee of Nosworthy, v. Bassett*, (*Comb. Rep.* 90; 3 *Mod.* 203, *S. C.*) And that decision was subsequently affirmed, upon a writ of error, in the house of lords. (See *Hungerford and Hill v. Nosworthy*, *Show. Cases in Parl.* 146.) In the subsequent case of *Harwood v. Goodright*, (*Cowp. Rep.* 87,) which came before the court of king's bench in 1774, it was held that a former will was not revoked by a subsequent one, the contents of which could not be ascertained; although it was found by a special verdict that the disposition which the testator made of his property, by the last will, was different from that made by the first will, but in what particulars the jurors could not ascertain. This case was also carried to the house of lords upon a writ of error; and the judgment of the court of king's bench was affirmed. As these two decisions of the court of dernier resort in England were previous to the revolution, they conclusively settle the law on the subject here. It is unnecessary, therefore, to examine the question as to the effect of the written declaration, which McGiffert obtained from the testator, stating that he had destroyed the last will for the purpose of reviving and giving effect to the first; or as to the capacity of the testator to do a testamentary act at the time when that written declaration was signed by him.

The decision of the circuit judge affirming the decree of the surrogate, must therefore be affirmed, with costs.

**RAWSON, administratrix, &c. vs. COPLAND.**

[Disapproved, 12 Hun 514. Limited, 59 N. Y. 574, 531.]

B. bought four lots of land, and gave back mortgages thereon, to the vendor, for the purchase money. B. afterwards sold and conveyed two of the lots to C., subject to the payment of one half of the mortgages, which C. agreed to pay, as part of the purchase money. The latter then conveyed the same lots to R., subject to the payment of the same amount; which R. in the same manner agreed to pay, as a part of the consideration of his purchase. After R.'s death the mortgages were foreclosed, the lots were sold, and the proceeds of the sale being insufficient to pay the demands, there were decrees over against B., the mortgagor, for the deficiency; which he was compelled to pay to the mortgagee. He then called on C. for the payment of his share of such deficiency, and received from him his bond and mortgage as security therefor. On a bill, by the administratrix of R., to foreclose a mortgage given by C. to R.; *Held* that the amount of the deficiency, was a demand existing against R. in his lifetime, which C. might set off against the amount secured by the mortgage to R. which the executors sought to foreclose.

To entitle a defendant to an offset, against an executor or administrator, it is not necessary that the defendant's debt should have been actually due, or really liquidated, at the death of the testator or intestate. But it is sufficient if it has become due and payable at the time the suit is brought against him by the executor or administrator; so that if the decedent had lived, and had brought a suit against the defendant, at that time, the demand of the latter would have been a proper subject of offset.

THIS was an appeal, by the complainant, from a decree of the assistant vice chancellor of the first circuit. In September, 1835, J. Bennem bought of A. Prince four lots of land in Brooklyn, and gave back a bond and mortgage upon two of those lots for \$1900; payable in five years, with semi-annual interest. He also gave back a similar bond and mortgage upon the other two lots for the like sum, and payable at the same time. Bennem subsequently sold one of the lots embraced in each of those mortgages, to the defendant E. Copland, subject to the payment of one half the amount secured by the mortgage thereon; which Copland agreed to pay as part of the purchase money. Copland subsequently conveyed the same lots to E. B. Rawson, subject to the payment of the same amount; which Rawson, in the same manner, agreed to pay as a part of the consideration of his purchase. In January, 1843, Rawson died. And his heirs and his administratrix having neglected to pay the



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amount which he had assumed the payment of, the mortgages were foreclosed. The proceeds of the sale being insufficient to pay the demands, there were decrees over against Bennem, the mortgagor, for the deficiency ; which he was compelled to pay. He therefore called upon the defendant Copland for the payment of his share of such deficiency, and received from him a bond and mortgage as security therefor. The bill in this cause was subsequently filed to foreclose a mortgage given, by Copland, to Rawson in his lifetime ; and the defendant, by his answer, claimed to offset the amount which he had thus been obliged to pay, on account of the debts which Rawson had assumed the payment of, against the amount due upon his bond and mortgage to Rawson. The vice chancellor decided in favor of the set-off, and made a decree accordingly. (*See 2 Sandf. Ch. Rep.* 251, *S. C.*) From that decree the complainant appealed to the chancellor.

*E. Paine*, for the appellant. The set-off claimed is not allowable, because the debt we sue for was due to the intestate before his death ; whilst the claim attempted to be set off was not a demand existing against the intestate, and belonging to the defendant at the time of his death. Rawson, the intestate, by buying the land subject to the mortgages given by Bennem, and assuming their payment, became thereby merely an indemnitor to Copland, who was also liable to pay them, and Copland had no demand against Rawson until he had himself paid the deficiency after it was ascertained by the sale of the land. And not having paid any thing until Rawson's death, it was not a demand existing or belonging to him at the time of Rawson's death. If there is any claim of set-off it rests on the ground that the defendant has paid the deficiency due on the mortgage which the intestate was to have paid. But the act set up as payment was not a payment which can be set off. It was not a payment of money, or what is equivalent to money. It was the mere giving of the defendant's own bond, secured by his own mortgage on property, for aught that appears, of no value.

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*E. Sandford*, for the respondent. The defendant is entitled to set off the amount paid by him for the deficiency on the foreclosure of the mortgages, the payment of which had been assumed by E. J. Rawson, deceased; (1.) As part of the purchase money remaining unpaid, for which the defendant had conveyed two lots of land to Rawson; and (2.) As for money paid, laid out and expended for said Rawson, or his estate; or (3.) For money which it was the duty of the complainant to pay, but which, in consequence of her omission and neglect, the defendant has been legally compelled to pay.

The defendant having been at all times ready and willing to pay the balance due to the complainant upon a fair accounting with him, for the money so paid by him, as averred in his answer, this suit was unnecessarily and improperly commenced. And the payment of costs in this court, being a matter to be directed by the court, in the exercise of its discretion, upon equitable principles, the defendant should not only be excused from the payment of the complainant's costs, but should recover his costs of the complainant, to be deducted from the amount to be found due on the bond and mortgage mentioned in the bill of complaint.

THE CHANCELLOR. The decision of the assistant vice chancellor was unquestionably correct. The revised statutes provide that in suits brought by executors and administrators, demands existing against their testators or intestates, and belonging to the defendant at the time of their deaths, may be set off, by the defendant, in the same manner as if the action had been brought by, and in the name of, the deceased. (2 R. S. 355, §§ 23, 37, of 2d ed.) To entitle the defendant to an offset against the executor or administrator, it is not necessary that the defendant's debt should have been actually due, or really liquidated, at the death of the testator or intestate. But it is sufficient if it has become due and payable at the time the suit is brought against him by the executor or administrator; so that if the decedent had lived, and had brought a suit against the defendant, at that time, the demand of the defen-

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dant would have been a proper subject of offset. And in this case, if Rawson, the intestate, had been living, and had filed this bill in his own name, to obtain satisfaction of the bond and mortgage due to him from the defendant, it is evident that the latter would have had the right to the set-off claimed in this case.

It is true, the decedent was not bound to pay the principal of the debts, which he assumed the payment of, before they became due and payable by the terms of the bonds and mortgages to A. Prince. But the contract of the decedent with this defendant was broken when the heirs and personal representatives neglected to pay the bonds and mortgages at the time they became due, in September, 1840. And the defendant having paid the amount to Bennem, or secured it by his bond and mortgage, which is the same thing in substance, the defendant's right of offset was complete at the time of the filing of the bill in this cause. The assistant vice chancellor has fully examined the several cases which have a bearing upon this question, and has taken the right view of them. It is not necessary, therefore, that I should examine them particularly. It is sufficient to say that the law corresponds with the manifest equity and justice of the case, as it appears from the pleadings and proofs.

The decree appealed from must, therefore, be affirmed, with costs.

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 GRAHAM, administrator, &c. vs. DICKINSON and others.

Where a testator charged his personal estate with the payment of his debts, but it being insufficient for that purpose, his executors applied to the surrogate for, and obtained, an order for the sale of his real estate in the possession of his devisees, which was sold accordingly, and the proceeds applied to the payment of the debts of the testator; and subsequently the commissioners under the treaty with France awarded to the executors a sum of money, upon a claim which their testator had

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against the French government at the time of his death : which fund they received for the benefit of the estate ; *Held* that the sum of money thus received upon the French claim was in equity to be considered a substitute for the real estate sold for the payment of debts primarily chargeable upon the testator's personal property, and that it belonged to those who were the devisees, or the owners, of the land thus sold, at the time of the sale.

*Held also*, that such devisees, or owners, were exclusively entitled to the *spes recuperandi*, or the hope of obtaining satisfaction from the French government, for the claim against it, the moment their property was sold under the order of the surrogate. That they were entitled to the proceeds of that claim, not as real estate ; but as a fund to which they had an equitable right to resort, to remunerate them for the loss of their lands.

Where the real estate of a married woman has been converted into personalty by operation of law, during her lifetime, it will be disposed of by the court, after her death, in the same manner as if she had herself converted it into personal property, previous to her death.

As between heirs and devisees, by the common law, lands undisposed of by the will are first to be applied to the payment of the debts of the testator ; where the personal estate is not sufficient for that purpose.

The case of *Flanagan v. Flanagan*, (1 Bro. C. C. 500,) commented upon, and overruled.

THIS case came before the chancellor upon an appeal from a decree of the assistant vice chancellor of the first circuit, upon the following state of facts. Isaac Clason died in March 1815, seised of real estate in the county of Westchester and in the state of New Jersey, and of a large real estate in the city of New-York. By his will he gave to his daughter Eliza Cooper a demand which stood charged against her upon his books, and an annuity of \$1000, charged upon his real estate so long as she was separated from her then husband ; in full satisfaction of all further provision out of his estate. And he declared that neither she nor any of her children by her then husband should be considered as the legal representatives of any of his other children, or inherit any portion of his estate as their heirs. He then devised his real estate in Westchester to his three sons, with the right of survivorship between them if either should die without issue before the time appointed by him for the division of that property between them. His real estate in the city of New-York he devised to his three sons, William J., Isaac S. and Augustus W., and to his other four daughters, Catharine

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Ann, Cornelia, Julia Ann, and Emily, in fee; but not to be divided until 1820, and the rents and profits in the meantime to be equally divided between them and the representatives of those who should die previous to 1820. The residue of his personal property he gave to his three sons, charged with the payment of legacies of \$3570 to each of his four last mentioned daughters, upon their respective marriages. The real estate of the testator in the state of New Jersey was not disposed of by the will of the testator.

Catharine Ann Clason, one of the daughters of the testator, afterwards intermarried with John H. Graham, the complainant; but whether before or after the sale of a portion of the testator's real estate in the city of New-York, under the orders of the surrogate, as hereafter mentioned, did not appear by the pleadings or proofs in this cause. At the time of the death of the testator he had a claim against the French government, for vessels captured and condemned by the authority of that government; the payment of which claim, or a part thereof, was afterwards provided for by the treaty with France. But at the death of the testator this claim was considered of no value, and the executors being ignorant of its existence, it was not inventoried; nor was it taken into consideration by the surrogate in making the orders for the sale of real estate to pay the debts of the testator. The personal estate of the testator being insufficient to pay his debts, his executors applied for and obtained an order for the sale of the real estate in New Jersey; and the proceeds of that sale were applied to the payment of such debts. But that being insufficient, they applied to the surrogate of New-York, in February, 1816, and obtained an order for the sale of a part of the real estate of the testator in that city; and in Jan. 1817, they obtained a further order for the sale of other portions of the real estate in the city of New-York. Under the two last mentioned orders a large amount of the real estate was sold by the executors; and the proceeds of the sales, so far as was necessary, were applied to the payment of the debts. The residue was equally divided among the devisees of the lands sold; after deducting from the shares of the three sons of

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the testator so much as the executors supposed they ought to contribute towards the payment of the debts, in reference to the value of the lands in Westchester county devised to the three sons exclusively.

Catharine Ann Clason, the wife of the complainant, died in May, 1831, without having had any issue; and her surviving husband afterwards took out letters of administration upon her estate. The commissioners under the French treaty subsequently awarded to the executors of Isaac Clason a large amount, for the claim which their testator had against the French government at the time of his death, and they received thereupon between sixteen and seventeen thousand dollars for the benefit of his estate. The complainant claimed one-seventh of the fund, recovered by the executors under the French treaty, as the personal representative of his wife, upon the ground that it was in equity a substitute for a part of the real estate, in the city of New-York, which had been sold for the payment of debts primarily chargeable upon the testator's personal estate. The executors resisted this claim, upon the ground that the fund was to be considered as real estate at the time of the death of the complainant's wife; and that it belonged to her heirs at law, and not to her personal representative.

The complainant thereupon filed his bill in this cause against the surviving executors of Isaac Clason, and against his devisees who still survived, and against the heirs and representatives of those who were dead, to recover his share of the fund in controversy. The assistant vice chancellor decided that the complainant was entitled to one-seventh of the net proceeds of the fund received by the executors under the French treaty. And he made a decree for an account; and for the payment of that share of the fund to him by the surviving executors, upon the coming in and confirmation of the master's report.

The following opinion was delivered by him.

M. HOFFMAN, A. V. C. In September, 1810, Isaac Clason made his last will and testament, giving one-seventh of his

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real estate in the city of New-York to Catharine, the late wife of the complainant. In December, 1815, an application was made to the surrogate for an order for the sale of certain real estate of the testator, upon the alleged deficiency of the personality. The order was granted, and real estate to the amount of over \$60,000 was sold, and applied in payment of debts. On the 24th of May, 1831, the wife of the complainant, one of the children and devisees of Isaac Clason, died without leaving issue. On the 4th of July, 1831, the French treaty was made, and under it the defendants, the executors of Clason, have received at different times about \$16,000. The question is between the complainant, as administrator of his wife, a daughter and devisee of Isaac Clason, and the heirs at law of such daughter, as to the right to this sum, or part of it. As favorable a light for the heirs at law as any in which the case can be presented is this, that the real estate had been to a great extent unnecessarily sold under a judicial sentence, and that there was a surplus. Or to put the case closer to the actual facts, suppose after the sale, and deeds delivered, but before distribution among the creditors, assets had unexpectedly come in from personal property, and to the amount in question. The creditors then would be paid out of personal estate. What becomes of the surplus proceeds? No doubt the devisee of the real estate, the wife of the complainant, would take. It is in effect a charge by the law upon real estate; precisely as a charge by the will of a testator, for payment of debts, with directions to sell. In such a case, undeniably, the surplus would go to the heir as against a mere general residuary legatee. (*Robinson v. Taylor*, 2 Bro. C. C. 589. *Halliday v. Hudson*, 3 Ves. 310.) So when a mortgage deed contains a power of sale, the surplus money to be paid to the mortgagor, his executors and administrators, if the sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if after his death, the equity of redemption descending to the heir, he takes the surplus. (*Wright v. Rose*, 2 Sim. & Stu. 323. *Moses v. Murgatroyd*, 1 John. Ch. Rep. 130.) The wife of the complainant plainly, therefore, in the case supposed would have taken the surplus

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proceeds of the real estate in her capacity of devisee. But she would have taken such surplus as money, not as land. And the devolution from her would be altered accordingly. (*Dixon v. Dawson*, 2 *Sim. & Stu.* 327. *Smith v. Claxton*, 4 *Mad. Rep.* 484.) "I adhere," says Sir John Leach, "to the principle which I stated in the case of *Smith v. Claxton*, that where the land is properly sold by trustees, and there is only a partial distribution of the produce of sale, there the surplus belongs to the heir as *money, not as land*." The testator devised real estate in trust to sell, and out of the proceeds to pay various charges and legacies. The sale was made in the lifetime of her heir at law, and there was a surplus. He was held entitled, as against a residuary legatee. But he died before the trusts of the will were completed. And the surplus was held to have vested in him as money, and to belong to his personal representative. The case of *Flanagan v. Flanagan*, before Lord Camden, (*Leigh & Dalzell*, 164, 1 *Bro. C. Rep.* 500,) goes upon a similar principle. The surplus proceeds were decreed to go, and of course must have gone, to the devisees of the real estate. But although they would have the character of realty, so as to let in all his real charges, such as judgments, yet it so vested in him as upon his death to go to his personal representatives. And this distinction meets and reconciles the case of *Banks v. Scott*, (5 *Mad. Rep.* 493,) so much relied upon. The avails of the estates sold after the bankrupt's death, went to his heir at law, being unnecessarily sold, as it turned out. The decision was placed upon the ground that the property descended, subject to the charge of the bankrupt laws. The heir was living. The question would have been very different if that heir had been dead, and the contest had arisen between his heirs and personal representatives. Then the cases I have referred to would have applied. The complainant is entitled to his share of the fund.

*John Anthon*, for the appellants. In all cases the intention of the testator must be respected, and technical rules of the court of equity cannot be allowed to control it. It was clearly



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the intention of the testator, in this case, that his real estate should remain in his own family, and descend, according to law, in his own line; in the event of intestacy in any of his children to whom he devised it. The wife of the complainant having died intestate, and there being no issue of the marriage, her portion of the real estate descended to her heirs at law, free from all claim on the part of the complainant, and such was the intention of the testator. The personal estate was charged with the payment of the testator's debts, and was sufficient for that purpose. The lands were only temporarily resorted to until the proper fund was realized. The proper fund for payment of debts, under the will, having now come into the hands of the executors, it must be treated in equity as having always been in their hands; and thus the intentions of the testator in his will can be carried out. The real estate having been unnecessarily converted into personalty, or temporarily only, when the necessity ceased and the proper fund came into the hands of the executors, they held that fund as real estate, in trust for the devisee and her heirs.

If the fund in question is to be deemed from the time of the sale, part of the personal estate of the testator, then it goes, under the will, to the residuary legatee. The conversion here, was the result of a mistake in fact; and this cannot, on any principle of equity, be allowed to change the rights of the heir. And in this particular the case under consideration differs from all the cases cited; in which the conversion was the result of hostile decrees, or judgments, unimpeached. Under all these circumstances, this fund represents real estate under the will, and is real estate in equity; and must descend to the heirs at law of the devisee. To allow the husband of the devisee to take it, in preference to her heirs, would be a clear and palpable violation of the testator's intention, and of the plain rights of the heirs at law. If this sum is not the entire sum for which the real estate of Mrs. Graham was sold, but a surplus after payment of the debts, it stands upon grounds equally conclusive. The purposes of the conversion being answered, the surplus is real estate, and goes to the heir. Such would have

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been the rule of equity, had the testator directed the sale; *a fortiori* it, must be so when the occurrence of unforeseen circumstances has so far affected the will of the testator. On every ground therefore the fund in question belongs to the heirs.

*H. P. Edwards & Geo. Wood*, for the respondent. The real estate in the city of New-York, though liable to the payment of the testator's debts, under the will, was not made the primary fund for that purpose. The real estate having been taken and applied to the payment of such debts, the devisees thereof are entitled to claim the personal estate since recovered, and a portion of which is claimed in this suit, in exoneration of the real estate thus disposed of, and applied to the payment of the said debts. In this construction of the law as applicable to this branch of the case, all parties agree; and, in pursuance of this construction, the executors have distributed the money received by them under the French treaty amongst the devisees, with two exceptions. That the devisees of the real estate sold to pay debts, are entitled to the money, is not disputed; and the only question is, whether on the death of Catharine Ann Graham, one of the devisees, before the distribution of the money by the executors, the same goes to her heirs at law, or to her personal representatives. The property claimed in this suit being *personal estate*, and claimed as such in equity, the complainant, on the death of his wife, is entitled to it as her administrator. If this personal estate were even to be considered in the light of the proceeds of the real estate, sold under the order of the court for the payment of debts, the conversion into personalty being made by the court, in a course of law, without fraud, the proceeds would be considered as personal estate, and as such pass to the personal representative. The rule is universal, that when real estate has been converted into money, either in pursuance of a power contained in the will of the testator, or under the order of a court having authority to make such order, and where there is no fraud, such proceeds of real estate are considered in equity as personal estate, and follow the order of distribution of personal estate. This is

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abundantly sustained by authority. In *Smith v. Claxton*, (4 *Mad. Ch. Rep.* 484,) the principle is laid down as applicable to wills; and in that case it was decided that where real estate is directed to be sold, and the proceeds divided between A. & B., and A. dies in the lifetime of the deviser, the heir is substituted in his place, and takes the share of A. But he takes it as money, and not as land. In *Dixon v. Dawson*, (2 *Sim. & Stew.* 327, 339,) the same principle is established; and it was decided that the freehold estate having been properly sold under the directions of the will, in the heir's lifetime, the heir at law was entitled to the surplus; but that such surplus, being money, it was part of his personal estate, and the heir being dead it belonged to his personal representatives. *Banks et al. v. Scott*, (5 *Mad.* 500,) was a case of the sale of real estate under proceedings against a bankrupt. There was a surplus of the proceeds of the real estate of the bankrupt, after the payment of all his debts. It was decided that the surplus of the proceeds of the real estate sold, or contracted to be sold, in the lifetime of the bankrupt, must, at his death, be considered as converted into personalty, and would go to his personal representatives. But that proceeds of real estate sold after his death would go to his heir at law. And that it made no difference, in principle, whether such conversion of the real estate was made in pursuance of the provisions of the law, or the provisions of the party. This case was relied upon by the defendants' counsel, in the argument before the vice chancellor, to show that the money, received by the executors of Isaac Clason, should go to the heirs at law of Catharine Ann Graham. Instead of sustaining the position taken by the defendants' counsel, it proves directly the reverse; for it establishes the general proposition that when real estate has been converted into *money*, in due course of law, such money is not considered as real estate but personal estate; and upon this principle that portion of the bankrupt's real estate which was sold in his lifetime, went to his next of kin. For as to the part which was sold after the bankrupt's death, although the surplus went to his heir at law, still it went to him as money; and if the heir at law had died before it came into

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his possession, it would have gone to his next of kin, and not to his heir at law ; which is the very principle we contend for in this case. (*See Dixon v. Dawson*, 2 Sim. & Stu. 339.)

But the case of *Flanagan v. Flanagan*, cited in *Leigh & Dalzel on Equitable Conversion*, 164, 5, (5 Law Lib. 82, 83,) is a case precisely analogous to the present, and sustains every principle for which we contend. In that case, a decree was made for the sale of the real estate, to supply the deficiency of the personal estate for the payment of debts. A sale was made in pursuance of such decree, and although there was a surplus, the court decided that the sale could not be considered as improperly made, there being no fraud, and that such surplus was money, and as such should go to the personal representative of the devisee of the real estate thus sold ; such devisee having died after the sale of the real estate ; and that the heir at law of such devisee had no right to receive any portion of such surplus. The personal estate in question is claimed by the owners of the proceeds of the real estate, sold and converted as aforesaid, on the ground that it ought to be substituted in the place of such proceeds. And as appears from the cases cited, the proceeds are in equity deemed, as they are in fact, personal estate. But the defendant's counsel says, in his argument, that "this case differs from all the cases cited, and that in those cases the conversion was the result of hostile decrees, or judgments, unimpeached." That is a mistake ; for the conversion in this case was made in pursuance of a decree of the surrogate of the county of New-York, which has been acquiesced in by all parties ; and, as an evidence of such acquiescence, the executors of Isaac Clason have paid over the moneys received by them from the French government to five of the devisees of the real estate sold as aforesaid, amongst which said devisees was the wife of one of the defendants, John F. Delaplaine. The defendants' counsel says that to allow the complainant in this suit to receive the share of Catharine Ann Graham in preference to her heirs, would be a clear and palpable violation of the testator's intention, and of the plain rights of the heirs at law. The cases above cited show that it would not be a violation of the

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rights of the heirs at law. It would not be in violation of the intention of the testator; for the devise of the real estate is absolute, and without any condition or limitation. Of course, then, it was the intention of the testator that in case one of the devisees should die, the share of such devisee should go to the person whom the law pointed out as his or her legal representative; which in this case is the administrator of the deceased devisee. If the testator had any such intention as the counsel assumes that he had, it is not declared in his will. There is a provision in the will of Isaac Clason that no division shall be made of the real estate until 1820, "and if any of my children shall die before such division of my said real estate shall be made, the legal representatives of those who shall die, shall be entitled to such portion," &c. The only intention, then, which the testator has expressed in his will applies to the decease of one of the devisees before 1820. He expresses no intention in case of the decease of any of the devisees after 1820. And, even in case of the death of one of the devisees before 1820, the only expression of the testator's intention is, that the share of such devisee shall go to his legal representatives; which is all we contend for in this case.

*J. Anthon*, in reply. So far as authority is concerned, there is no case in point against us. The cases cited by the counsel for the respondents travel around the question. But no chancellor has yet undertaken to meet this precise case in the teeth, and to declare, that an accidental occurrence, like the one in this case, shall in effect, by the application of arbitrary general rules, make a will for a testator obviously different from his expressed intentions. The case of *Flanagan v. Flanagan* is the only one in the books which really approaches this case; and that wants the peculiar feature which distinguishes the present from all the reported cases. Its effect was not to take the real estate of the wife out of the course of its strict legal descent and give it to the husband, out of the testator's line and against the manifest intention expressed in his will. All the other cases cited are more or less applications of the rule of conversion

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consistently, according to legal inference, with the testator's intention, but certainly never against it. *Flanagan v. Flanagan* is then, in truth, the only case on which the respondent can hang his hopes; and this, as I have already observed, is by no means parallel. It is a case also of questionable authority, even so far as it goes. It is nowhere reported at length. The counsel for the respondent appear to have the insuperable difficulty cast in their way, by the testator's intention declared in his will, in direct opposition to the rule he seeks to establish; and hence, after referring to insufficient cases, they look to the will and endeavor to show that it is not inconsistent with the testator's views that the property in question should go to alien families. Now on this head the court will perceive that the will is a very severe one, dealing out a modicum to one of his own blood, Mrs. Cooper, who had offended him by her marriage, and in effect disinheriting her issue, and then parceling out to each of his children with great strictness his or her particular share. There is no overflowing of affection for the human race, and no intention that his labors shall go to enrich persons of whose very existence he was ignorant. The counsel for the respondent, on this branch of the case, rely on a particular section of the will as manifesting either an indifference on this point, on the part of the testator, or a willingness and intention that the property devised should pass to legal representatives in a different sense from heirs. In both, I think they are quite unfortunate. In the clause thus referred to there is a marked distinction in the language, strongly evidencing the testator's intention to keep the lands devised in his own line: thus, "All my real estate in the city and county of New-York, I give and devise to my daughter Cornelia, &c. and to their heirs and assigns forever, to be equally divided, &c. but no division shall be made &c. until 1820." Until such division, the will provides "that the rents and profits shall be equally divided;" and then follows the clause on which the respondent relies; "and if any of my said children shall die before such division is made, the legal representatives of those who shall die, shall be entitled not to the share of the dece

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dent in the lands, but) to such portion of the said rents, issues and profits as the person they shall represent would have been entitled to if living." If this clause announces any thing in relation to the testator's intention, it clearly announces this: that he intended that the lands should always descend to the heirs at law of the devisees, but that the rents and profits might, in the event of the death of the devisee, go to the executor of such devisee, while the lands descended to the heirs. I think the force of this position, drawn from the will, was before the mind of my learned opponent, while framing this part of his argument. I cannot otherwise account for his careful omission of the words *rents, issues and profits*, after the word *portion*; words which so decidedly limit its meaning. In conclusion, all that the appellants insist upon in this case, is that the will of the testator be observed, and that such will be not defeated by any perverted application of arbitrary rules, adopted by the court of chancery for a very different purpose, viz. to reach the intent and not to defeat it.

THE CHANCELLOR. There can be no doubt that the fund in controversy, in equity, must be considered as a substitute for the land in the city of New-York; and that it belongs to those to whom the land was devised, or to those who now represent their rights, exclusively. It is suggested in some of the answers that the real estate in New-Jersey, which was not disposed of by the will of the testator, was also sold for the payment of the debts; that such land descended to all the children of the decedent, and that by the laws of New-Jersey which were then in force, the sons took by descent, from their father, shares which were twice as large as those of the daughters; and that they, or their representatives, are entitled to a part of the fund in controversy, on account of the sale of those lands. The answer to that claim is that the value of the lands which were sold in New-York, far exceeded the amount recovered under the French treaty; and that, by the common law, as between heirs and devisees, the land which is undisposed of by the will of the testator is primarily liable for the payment of the debts of the de-

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cedent, and must first be resorted to for that purpose. Here, the whole personal estate of the testator, including the amount subsequently recovered under the French treaty, and the proceeds of the whole real estate undisposed of by the will, were insufficient to pay the debts of the testator. The devisees of the real estate, in the city of New-York, which was sold to pay debts, exclusively were entitled to the *spes recuperandi*, or hope of obtaining satisfaction from the French government, for the testator's vessels which had been illegally captured and condemned. For if this fund had been received and applied to the payment of the debts, immediately after the death of the testator, the real estate in New Jersey, not disposed of by the will, must still have been sold for the same purpose. Not so, however, as to a portion of the real estate in the city of New-York, which was devised to seven of the testator's children in equal proportions. For if the part of the personal estate which then consisted in the mere hope of obtaining an indemnity from the French government, could have been realized at that time, a part of the real estate in the city of New-York, which was subsequently sold under the surrogate's order, would have been saved to the devisees. This brings me to the main question in controversy in this cause. Was the hope or chance of obtaining remuneration from the French government, to which the devisees of the city property were equitably entitled the moment their property was sold under the surrogate's order, real or personal estate, before the money was actually received by the executors, under the treaty?

If either of the devisees had died before the actual sale of the property under the surrogate's order, even after the order for sale had been made, that land would have descended to the heirs at law of the decedent. And upon a sale of such land they would have been subrogated to the rights of the creditors, as to this French claim, which was a part of the personal estate of Isaac Clason. For in that case the real estate of the heirs of the original devisee, and not the real estate of such devisee, would have been sold for the payment of the debt which was chargeable primarily upon the personal estate of the deviser;



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and the heirs of the devisee would of course be subrogated to the rights of the creditors as to the personal estate, which was primarily liable. So, if a judgment debtor should die leaving personal property sufficient to pay his debts, and the sheriff, having advertised the real estate of the decedent for sale previous to his death, should afterwards proceed and sell the same, after it had become the real estate of the heirs at law, the heirs would be entitled to be subrogated to the rights of the judgment creditor, as against the personal estate which was primarily liable for the payment of such judgment. This being so, the decision of Lord Camden, in *Flanagan v. Flanagan*, referred to by the counsel of the appellants and by the assistant vice chancellor, was clearly wrong; if the facts of that case are correctly stated by Sir Thomas Sewell in *Fletcher v. Ashburner*, (1 Bro. C. C. 500.) For, from that statement it appears that the land which was sold under the decree by mistake, was not sold until after the legal title had been cast upon the grandson; as heir; the grandfather, to whom that half of the estate belonged, having died subsequent to the decree, but before the sale. It was the property of the grandson, therefore, which was erroneously sold in that case. Consequently he was not only equitably but legally entitled to the proceeds of the erroneous sale. (*Smith v. Kearney*, 2 Barb. Ch. Rep. 551.) And the same should not have been decreed to the personal representatives of the grandfather, as they properly would have been had the land been actually converted into personal estate by a sale previous to his death.

In the case under consideration, the real estate had actually been converted into personalty, by the sale, fourteen years before the death of Mrs. Graham; although the substituted fund was not really received by the executors until some time after her death. The moment the land was sold, the devisees became entitled to the proceeds of the French claim; not as real estate, but as a personal fund to which they had an equitable right to resort to remunerate them for the loss of the land. The right of Mrs. Graham to one-seventh of the French claim was an interest in personal estate which she had at the time of

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her death. And her real and her personal representatives being equally volunteers, there is nothing to take this case out of the general rule that they must take their estate of the intestate as they find it.

It is true, if the real estate of the devisee had not been sold under the order of the surrogate, and she had continued to own it until the time of her death, it would have descended to her heirs at law, and her husband would have been excluded. But there is no legal presumption that a feme covert who is the owner of real estate will not join with her husband in selling it, for the purpose of converting it into personalty. And the real estate in this case having been converted into personalty, by operation of law, during her lifetime, it must now be disposed of in the same manner as if she had herself converted it into personal property.

The cases referred to in the opinion of the assistant vice chancellor fully sustain his decision in this case; and I do not see how he could have come to a different conclusion without disturbing principles which have been long settled. The decree appealed from must therefore be affirmed, with costs.

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**PIERCE vs. ALSOP.**

Where, subsequent to the death of a person who died intestate, without leaving sufficient personal estate to pay his debts, his heir at law conveyed to a creditor of the decedent a portion of the real estate which descended to him as heir at law, in part payment of the debt owing to the grantee by the decedent; *Held* that such conveyance was not entitled, even in equity, to a preference over the legal lien of a judgment previously obtained by another person, against the heir at law; it not appearing that there was no other real estate to pay the debts of the testator, after applying the personal property for that purpose.

To entitle a creditor of a deceased debtor to a legal preference over a judgment creditor of the heir at law of the debtor, he must himself proceed to a judgment, or decree, against the heir at law, for the debt due from the latter, in respect to the lands descended from the deceased debtor. Or he must apply to the surrogate,

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for a sale of the land, to satisfy the debts of the decedent which the personal estate is insufficient to pay.

A person has no right to apply to the court to set aside an execution for irregularity, so far as it affects his rights, in a suit to which he is not a party.

The issuing of an execution, after the lapse of two years, without reviving the judgment by scire facias, where all the parties to the judgment are alive, is an irregularity merely; and does not render a sale under it void.

THIS was an appeal from a decree of the late vice chancellor of the third circuit, allowing a demurrer, and dismissing the bill of the complainant, with costs. Gilbert Devoe died in September, 1834, intestate, leaving his father C. Devoe his heir at law; to whom all the real estate of the decedent descended, subject to the payment of his debts. The decedent was indebted to C. & I. T. Storms more than \$20,000, they being his principal creditors; and his personal property was wholly insufficient to pay his debts. In January, 1837, the defendant J. W. Alsop jr. recovered a judgment against C. Devoe and J. H. Devoe, for a debt due from them personally; which judgment was duly docketed, and became a lien upon the real estate which came to C. Devoe as the heir at law of his son G. Devoe, deceased.

In March, 1839, C. Devoe, the heir at law, for the purpose of satisfying a part of the debt due to C. & I. T. Storms, from his deceased son, conveyed to C. Storms a lot of land in the city of Albany, which had descended to him as such heir at law. The portion of the debt for which this lot was received in payment was \$11,000; which was more than the actual value of the lot at the time of such conveyance. And at the time when the lot was thus received in part payment of the debt due from G. Devoe, deceased, to C. & J. T. Storms, they were ignorant of the existence of the previous judgment recovered against C. Devoe, the heir at law, and J. H. Devoe, in favor of Alsop. In February, 1842, C. Storms conveyed the Albany lot which had been deeded to him by the heir at law of his deceased debtor, to the complainant H. Pierce.

In November, 1842, Alsop caused an execution to be issued upon his judgment against C. Devoe and J. H. Devoe; under which execution the sheriff levied upon the Albany lot, and in the month of February, 1843, sold it at public vendue, to satisfy

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the amount due upon the judgment. The complainant's attorney attended at the sheriff's sale, and gave notice to the bidders of his claim to the lot, and the circumstances before stated, which he insisted would be sufficient to defeat the title of the purchaser at the sheriff's sale. The defendant, however, by his agent, bid off the premises at the sheriff's sale, under his judgment and execution, and received the usual certificate therefor. But the sheriff had not executed a deed of the premises at the time of the filing of the bill in this cause; although the time of redemption had expired a few days before.

The complainant's bill, after stating these facts, and that the defendant refused to relinquish his claim under the sale, and that he intended to take a deed from the sheriff which would be a cloud upon the complainant's title, prayed for a decree declaring that the judgment of Alsop was not a lien upon the land, as against the complainant's title under the conveyances mentioned in the bill, and that the complainant's title was perfect; and that the defendant Alsop might be perpetually enjoined from taking a deed from the sheriff, or from commencing any ejectment suit for the recovery of the premises, or from disturbing the complainant in the peaceable enjoyment thereof. To this bill the defendant put in a general demurrer for want of equity; which demurrer was allowed by the vice chancellor, and the bill dismissed.

The following opinion was delivered by the vice chancellor.

A. J. PARKER, V. C. By the death of Gilbert Devoe, on the 6th of Sept. 1834, the premises in controversy became the property of Christopher Devoe, his father, and heir at law. His title to the land was absolute, subject only to be defeated by proceedings that might be instituted by the personal representatives or creditors of Gilbert Devoe, to charge upon it the payment of his debts, if his personal property should prove insufficient for that purpose. This could be done within three years after the granting of letters testamentary or of administration; on application to the surrogate by the personal representatives, to sell the real estate for the payment of the debts

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of the deceased. (2 *R. S.* 2d ed. p. 39, § 1.) Or on the application of a creditor, after the rendering of an account by an executor or administrator. (*Sess. Laws of 1838*, p. 536, § 72.) And it was provided by the revised statutes that if such application should not be made within three years from the time of granting letters testamentary, or of administration, a bill in equity might be filed by the creditor against the heir, at the expiration of that time, to collect the debt due by the ancestor out of lands descended to the heir. (2 *R. S.* 46, § 53. *Id.* 370, § 42.) And by the act of 1837, (*Laws of 1837*, p. 537, § 73,) a suit at law may now be brought for the same purpose. By these modes, and by these only, could the title of the heir be defeated, and the land that had descended to him be charged with the payment of the debts of the ancestor. Neither of these proceedings has been instituted by the creditors, whom the complainant claims to represent in this case; but the complainant contends that by the deed of Christopher Devoe to Charles Storms and Isaac T. Storms, the creditors of Gilbert Devoe, deceased, in part satisfaction of their demand, on the 28th of March, 1839, and by the subsequent conveyance from them to the complainant on the 21st of February, 1842, he has acquired a title superior to that obtained by the defendant under his prior judgment, recovered against Christopher Devoe, for his own personal indebtedness on the 7th of January, 1837. It is clear that the defendant has the legal estate; and if the complainant has any equitable right, that is to prevail over the legal title. It rests upon the circumstance that the consideration of the deed to his grantors was the indebtedness of the deceased.

By 2 *R. S.* 371, § 48, it is provided that a bill filed against the heir, to enforce the collection of the debt due from the ancestor, "the final decree rendered in such suit shall have preference, as a lien on the real estate described, to any judgment or decree obtained against such heir personally, for any debt or demand in his own right." And it is certain from the facts alleged in the bill of complaint in this cause, and admitted by the demurrer, that such a decree might have been obtained by

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the Messrs. Storms, that would have overreached the previously docketed judgment of the defendant. Under an execution sale by virtue of such a decree, a legal title would have been obtained, superior to the title obtained by the defendant. But this bill is not filed for the purpose of obtaining any such decree; nor could it be, by the complainant, for he was not a creditor of Gilbert Devoe. The bill of complaint in this case is filed for the mere purpose of protecting a legal title previously acquired; and in my opinion, the complainant cannot go back of his legal title, to avail himself of any equitable interests which were vested in, and might have been enforced by, others from whom he derives title. I do not see that the complainant's title to the land is at all strengthened by the fact that his grantors applied in payment of their purchase a portion of their demands against Gilbert Devoe. The creditor can only secure a preference by a careful compliance with the provisions of the statute. And that requires a solemn adjudication of a court of justice, declaring by its judgment or decree the existence and extent of a debt against the ancestor, and its priority as a lien over the previously acquired judgment, obtained against the heir. The heir cannot, by executing a deed to the creditor of his ancestor, cut off the lien of a judgment recovered by his own creditor. It is the right of his creditor that the requirements of the statute shall be strictly pursued. If the Messrs. Storms had proceeded to obtain a judgment or decree, and to sell the premises under execution, the defendant might have exercised the right of redeeming or acquiring the title under the statute, as a junior judgment creditor. (2 R. S. 294.) If the taking of a deed from the heir is equivalent to a purchase under an execution sale, then it is a successful evasion of the statute, depriving the defendant of his chance of acquiring the title by redemption. It is no answer to this position to say, that the Messrs. Storms were creditors of Gilbert Devoe for a much larger amount than the value of the land. The rule must be applicable to all cases, and the right of the defendant to redeem, if he shall think proper to do so, cannot be cut off by any collusion between the heir and the creditor. Suppose

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the Messrs. Storms had obtained a judgment against the heir for a demand, due by the heir personally, before the judgment was recovered against him by the defendant, and after the docketing of defendant's judgment, the heir had released or conveyed to the Messrs. Storms; they would have lost their priority, and their legal title would have been subordinate to that obtained by the defendant under his judgment and execution. And on a bill filed to quiet that title, and to restrain the defendant from interfering with it, it could not avail them that the consideration for their deed was their prior unsatisfied judgment. The only course by which to avoid the effect of the subsequent judgment of the defendant, would be to sell under the prior judgment. In no other way could a title be obtained that would avail either at law or equity.

I do not find that the question I have examined has ever been expressly decided in the courts of this state, since the provisions of the revised statutes, prescribing the mode in which the creditors of the ancestor might obtain a preference, were enacted. But in *Morris v. Mowatt*, (2 Paige, 586, 592,) Chancellor Walworth says, "probably to give the purchaser a perfect legal title, sufficient in a court of law to protect him against a sale under a previous judgment against the heir or devisee, it may be necessary to issue an execution on the decree, and to have the property sold by the sheriff, in the usual manner. On this point, however, I do not mean to be understood as expressing any definitive opinion." See also *Butts v. Genung*, (5 Paige, 264,) where the chancellor has considered the effect of the provisions of the revised statutes regulating proceedings against next of kin, devisees and heirs.

The counsel for the complainant cites *Lewin on Trusts*, 209; 4 Ves. 368, to show that it is a rule in equity, "that what is compellable by suit is equally valid if done by a trustee without suit." This is undoubtedly a well settled principle; but it can have no application in this case. Neither the complainant, nor those from whom he derives title, stands in the relation of trustee, to any other person interested in the question. And it will never do to say, that in a struggle between creditors for the

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preference, the complainant is to have all the advantages that his grantors might have secured by vigilance, but which, by their negligence, they have failed to obtain. Nor does it at all affect the decision of this case, that the Messrs. Storms had not actual notice of the existence of the defendant's judgment. It was enough for the defendant to docket his judgment, and it then became a lien of which all were bound to take notice.

It is also insisted in the bill of complaint, that the sale under the defendant's execution was void ; more than two years having elapsed, after the docketing of the judgment, before execution was issued, and the judgment not having been revived by scire facias. It is not alleged in the bill that such execution was issued without the consent of Christopher Devoe ; but whether such consent was given or not, no one but the defendant in an execution can take advantage of such an irregularity. (*Jones v. Cook*, 1 *Coven*, 309. *Ross v. Luther*, 4 *Id.* 158. *Ontario Bank v. Hallett*, 8 *Id.* 192. 5 *Wend.* 170. 6 *Id.* 367. 8 *Id.* 545. 12 *Id.* 96.)

I come, therefore, to the conclusion, in this case, that the equitable claim of the creditor of the ancestor can only be enforced against lands descended to the heir, by a strict conformity to the provisions of the statute, and that the creditor, on a bill filed to protect his legal title, cannot avail himself of any equitable interests existing in his grantors, and which they might have enforced. This opinion being upon the merits of the complainant's claim, is decisive of the cause, and it will be unnecessary to examine the other questions discussed by counsel at the hearing.

*S. H. Hammond*, for the appellant. The bill must be taken as true ; and the facts charged must be taken in their strongest sense against the defendant demurring. Hence, although the bill charges that Gilbert Devoe died possessed of little or no personal property, it will be understood as charging that Gilbert Devoe died possessed of no personal property. And hence also, it will be understood that the Storms were the only creditors of Gilbert Devoe, at the time of his death. This being



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understood then, viz. that G. Devoe left no personal estate, and that the Storms were his only creditors, the questions are, (1.) Did Christopher Devoe take the property in question subject to the lien of the debt of Storms? and (2.) Could he dispose of the property for the payment of that lien or debt, without the interference of the courts, or the necessity of a lawsuit? In *Morris v. Mowatt*, (2 *Paige's Ch. Rep.* 590,) the chancellor says, "in the case under consideration the debts due from the testator to these complainants and others were equitable liens upon the estate devised to his sons, which liens are prior in point of time to the judgments against the sons for their own private debts," &c. The debt of the ancestor was an equitable specific lien upon this property in the hands of the heir; and the heir not having aliened the land, a judgment or decree for the debt of the ancestor could not have been enforced against the heir personally. It could only be satisfied by a sale of the property descending to him. (9 *Paige*, 28, *et seq.* 2 *R. S.* 369, 370, 371.) At the time when the Storms took the conveyance from Christopher Devoe, they had a right to proceed against him to compel a sale of the real estate to pay their debt. And on the facts of this case this court would have decreed a sale, and that decree would have had a preference as a lien over the defendant's judgment; and the purchaser at the sale would have acquired a better title than the purchaser under the defendant's judgment. He would have taken it discharged of any lien under the defendant's judgment. (2 *R. S.* 371 § 48. 2 *Paige*, 493. 9 *Id.* 28.) I assume, then, that the debt of Storms was an equitable specific lien on the premises in question older and better in reference to priority, than the lien of the defendant's judgment. It was also a lien twice as large as the value of the property. The debt was over \$20,000, and the premises worth less than \$11,000. Christopher Devoe, then, took this property subject to an incumbrance, (a specific one,) of twice its value; an incumbrance which could not be enforced against him personally. Subsequently a judgment was obtained against him for his personal debt. This became a lien. On what? The land itself; or on his interest after discharg'ng

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the debt of the ancestor? I suppose only on his interest beyond the prior specific lien. But that prior specific lien was twice the value of the property.

As to the second question—could Christopher Devoe dispose of the property for the payment of the debt of the ancestor; or in discharge of the equitable specific lien upon it? Or must he or the creditor encounter the expense of a lawsuit, where there is no possible dispute about the facts, and no questions about equities? That the Storms, when they took the deed, could have divested Christopher Devoe of the title by a decree of this court, no man can doubt; and that too free of the lien of the defendant's judgment. Now, it is a well settled principle that equity will sanction, if voluntarily done, whatever it would by its decree have required to be done. In other words; equity will regard as valid what is done without suit, if the doing of it is compellable by suit. (*Lewin on Trusts*, 209. 4 *Ves.* 368.) Applying this principle; the heir, regarding the land as less in value than the debt of the ancestor, chose to avoid a litigation by doing voluntarily what this court, by a decree, would have done for him, viz. to sell the land for the payment of the ancestor's debt. Equity will sanction the act.

But it is said the Storms must resort to a bill in chancery. For what? To compel a sale of the land? The person holding the legal title was willing to sell without suit. To obtain payment of their debt? The debtor was willing to pay to the extent of his liability, without a suit. Must they file their bill to prevent collusion and to save their property from sacrifice? It is admitted that they gave more for it than it was worth; and the court will not presume that it might bring more than its value. I take it for granted that the court will never require parties to go into an expensive litigation where there is no dispute about facts; where all parties admit the liability, and its extent; and where no one can be possibly injured by an amicable adjustment; especially where that adjustment is precisely what the court would have done by its decree, if the litigation had been had. Suppose this bill should be dismissed and we proceed, as the defendant contends we should have

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done, against Christopher Devoe, to collect the debt due from Gilbert Devoe; what will the issue be? Why that this property in dispute will be sold to pay our debt as far as it will go. We shall become the purchaser; or, what is the same thing, receive the avails of the sale; thus arriving, by an expensive and tortuous course, precisely where we are if our deed be held valid. Now who would be benefited by this? Not the defendant; for he would be entitled only to the surplus, after paying all the debt of Gilbert to the Storms. That would be nothing, because the property is worth less than \$11,000, and our debt is \$20,000; and when we bought we gave more than it was worth. Not the other creditors of Gilbert Devoe, because there are none. The court will see that the only persons benefited by the litigation would be the lawyers who should conduct it.

*H. Harris*, for the respondent. Upon the death of Gilbert Devoe, the title to the real estate in question descended to, and vested in, Christopher Devoe his father and heir at law, subject to be defeated by a sale made under an order of the surrogate, upon the application of the executor or administrator, or of a creditor of the deceased. (2 R. S. 100, § 1. *Id.* 108, § 48. *Id.* 109, § 53.) The judgment recovered by the defendant against Christopher Devoe, on the 7th day of January, 1837, (the title to the real estate being then vested in him,) became a lien upon the real estate which had descended to him from Gilbert Devoe, which could only be defeated by a sale under an order of the surrogate, upon application made to him for that purpose, within three years from the time of granting letters testamentary or of administration, or by the operation of some other lien having the preference. It does not appear whether letters testamentary or of administration upon the estate of Gilbert Devoe have been granted or not. If such letters have not been granted, then Christopher Devoe's title has not, at any time since the death of Gilbert Devoe, been liable to be defeated by any creditor of Gilbert Devoe. If such letters have been granted, and no application has been made to the surrogate for an order of sale, and three years have elapsed since such letters

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were granted, then the title of Christopher Devoe can only be defeated by a creditor of Gilbert Devoe, obtaining a decree against him as heir, pursuant to the provisions of law, and causing the land to be sold under such decree. (2 R. S. 452, §§ 32, 38, 42, 46, 47, 48.) A decree against the heir at law, in favor of a creditor of the estate, is not a charge upon the land descended, if before the commencement of the suit in which such decree is obtained the land is aliened by the heir. (2 R. S. 454, § 49. *Id.* 455, § 51.) In this case, Christopher Devoe having aliened by his conveyance to Charles Storms, a creditor of Gilbert Devoe, before the commencement of any suit against him as heir of Gilbert Devoe, Storms acquired by such conveyance an absolute title to the land, subject to the lien of the defendant's judgment which had been recovered prior to the conveyance. If the conveyance of Christopher Devoe to Storms was not such an alienation as would prevent Storms, or any other creditor, from commencing a suit and obtaining a decree for the sale of the land, yet the sale by the sheriff, under the execution in favor of the defendant, is such an alienation as would prevent any decree obtained against Christopher Devoe as heir at law, in a suit commenced subsequent to the sheriff's sale, from becoming a lien. (4 *Kent's Com.* 431.) If neither the conveyance to Storms nor the sheriff's sale is such an alienation as would prevent a decree in favor of a creditor of Gilbert Devoe from becoming a lien upon the land descended in preference to any lien in favor of a creditor of Christopher Devoe, still the lien of the latter can only be defeated by obtaining such decree; and even then his right of redemption would remain. If the defendant's lien by virtue of his judgment, or his title by virtue of the sheriff's sale, is to be defeated at all, it can only be done by a creditor of Gilbert Devoe, and by a proceeding in conformity with the statute. No such proceeding having been had, and the time for redemption under the sheriff's sale having expired, the defendant's title has become absolute. The complainant in this suit is not a creditor of Gilbert Devoe, nor has he succeeded to the rights of a creditor. He is a mere purchaser of the interest of Storms, acquired under his

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conveyance from Christopher Devoe, and without covenants of warranty. His only title is under the deed from Christopher Devoe to Storms. He cannot therefore avail himself of Storms' debt against the estate of Gilbert Devoe to perfect his title.

THE CHANCELLOR. The decision of the vice chancellor in this case is unquestionably right. And if the complainant, or those through whom he derived his title to the premises in question, have any remedy, it must be in the character of creditors of G. Devoe, the intestate, and by means of an order of sale to be made by the surrogate. Only about one half of the debt of C. & J. T. Storms was extinguished by the conveyance to C. Storms; and if there was no other property belonging to the intestate, to satisfy the residue of the debt, the surrogate probably has the power to direct a sale of the lot in question to satisfy that indebtedness. There is no allegation in this bill, however, that G. Devoe did not have other real estate sufficient to pay all his debts. Nor does it appear what became of the personal property, which belonged to the intestate at the time of his death. The whole of this bill is based upon the mere fact that the decedent had not sufficient personal property to pay *all* his debts, and that this portion of his real estate was conveyed by the heir at law in part payment of a debt due by the intestate, and at a price not below its actual value. This was not sufficient, even in equity, to entitle that conveyance to a preference over the previous legal lien of Alsop's judgment upon the premises in the hands of the heir at law. To entitle the creditor of the decedent to a legal preference over the judgment creditors of the heir at law, he must himself proceed to a judgment, or decree, against the heir at law for the debt due from the latter in respect to the lands descended from the intestate. Or he must apply to the surrogate for a sale of the land, to satisfy the debts of the intestate, which the personal estate is insufficient to pay.

The allegation in the bill that the Storms were ignorant of the existence of the judgment of Alsop at the time of the conveyance of the premises to C. Storms in part payment of their

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debt, did not alter their legal or equitable rights. For the judgment was duly docketed; and it is not pretended that Alsop, the judgment creditor, did any thing to deceive or mislead the Storms in relation to his lien upon the lands which had descended to one of his judgment debtors as heir at law of the decedent.

The bill does not distinctly show that there was any irregularity in the issuing of the defendant's execution. But even if it was irregularly issued, the remedy of the complainant is not in this court, but by a summary application to the court of law to set aside the execution for irregularity, so far as it affects his rights; if he has a remedy any where to correct an irregularity in a suit, against another person, to which he is not a party. The vice chancellor refers to several authorities to show that he has no such right, so far as relates to a question of regularity merely. And the issuing of an execution after the lapse of two years, without reviving the judgment by a scire facias, where all the parties to the judgment are in full life, is an irregularity merely, and does not render a sale under it void.

The decree appealed from is not erroneous, and it must be affirmed with costs.

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DUNHAM vs. GATES and others.

Upon a bill to set aside a bond and mortgage alleged to have been given by an insolvent debtor, to the mortgagee, to defraud the creditors of the mortgagor, if the assignees of the mortgage deny any knowledge of the alleged fraud, by a separate answer, the answer of the assignor cannot be used as evidence against them to establish such fraud.

But if they join with him in an answer and admit their belief that what he states in the answer is true, if his admissions in such answer establish the fraud, it is sufficient to entitle the complainant to a decree against the assignees of the mortgage.

And where the assignees of the mortgage put in a joint answer with the assignor, what is stated by him in such answer, responsive to the charges or interrogatories in the bill, will be evidence in favor of the assignees, to the same extent that it is evidence in favor of the assignor.

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Dunham v. Gates.

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THIS was an appeal from a decree of the assistant vice chancellor of the first circuit, dismissing the complainant's bill without costs to either party.

In April, 1826, C. Gates gave to his brother, Gerrit Gates, one of the defendants in this cause, a bond and mortgage, to secure the payment of \$2878, in one year, with interest; which mortgage was shortly afterwards assigned to the respondents, W. W. Chester and T. L. Chester, in part payment of a much larger debt due to them from the mortgagee. The complainant afterwards recovered a judgment against the mortgagor for a debt contracted before the giving of the mortgage; and under an execution upon that judgment the interest of C. Gates, the mortgagor, was sold by the sheriff, and the complainant became the purchaser thereof. He thereupon filed the bill in this cause against the mortgagor and mortgagee, and against the two Chesters, as the assignees and owners of the bond and mortgage, as fraudulent. C. Gates, the mortgagor, was an absentee, and was not served with process; and the bill was taken as confessed against him for want of an appearance. The defendants, Gerrit Gates, the mortgagor, and the two Chesters, put in a joint and several answer, denying the alleged fraud and want of consideration for the bond and mortgage; the former positively, and the latter upon their information and belief. A replication was filed, but no testimony was taken in relation to the alleged fraud or want of consideration for the bond and mortgage.

*R. Manning*, for the appellant.

*O. Bushnell* for the respondents.

THE CHANCELLOR. The bond and mortgage being prima facie evidence of a good consideration, the onus of showing that they were given without consideration, or for the purpose of defrauding the complainant, rests upon him; and if he has not established it by the answer of the defendants, he must of course fail in the suit. If the Chesters had not joined in the answer with Gerrit Gates, who had no interest in the bond and

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mortgage at the time of the commencement of the suit, no admission in his answer would have affected their rights. And the only way in which the facts stated by him could have been made available against the Chesters, in favor of the complainant, would have been to dismiss the bill as against Gerrit Gates, and examine him as a witness. But by joining with him, in their answer, and swearing that what he states as matters within his own knowledge they believe to be true, they have entitled the complainant to the benefit of the discovery if the answer makes out a case of fraud in the giving of the bond and mortgage. On the other hand, if the answer does not establish the fraud charged by the complainant, the respondents are entitled to the benefit of all the facts sworn to by the defendant Gerrit Gates, responsive to the charge of fraud and want of consideration, to the same extent that Gates could avail himself of them as evidence in his own favor.

The only question therefore is, whether the answer shows a case of fraud in the giving of this bond and mortgage? For if it does not, the complainant has failed in establishing the charge made in his bill. And I think the assistant vice chancellor came to the correct conclusion in deciding that the fraud was not established by the admissions in this answer; the whole of which answer, so far as related to the consideration of the bond and mortgage, the circumstances under which they were given, and the reasons for giving them, was directly responsive to the bill, and was also called for by the special interrogatories contained therein. The fact that no administration had been taken out upon the estate of the father of G. and C. Gates was wholly immaterial, so far as the complainant was concerned, if the amount due and coming to the other members of the family who consented to the arrangement, out of the indebtedness of C. Gates to the estate, was as stated in the answer. Although the answer does not leave the case entirely clear from suspicion, it certainly contains nothing which could justify any court in saying that a clear case of fraud is made out by the admission in this answer.

The decree appealed from must therefore be affirmed with costs.



**SPOOR and others vs. WELLS.**

Where the husband had a contract for the purchase of land upon, which he made a mere nominal payment, and he afterwards died without leaving any means of paying for such lands, leaving a wife and several infant children surviving him, and the wife subsequently paid for the land and took a deed thereof in her own name, and afterwards conveyed the same with warranty; and her children after they became of age waited from nine to fifteen years, and until their mother had become insolvent, before they attempted to assert their claim, in equity, to the land; *Held*, that their bill was properly dismissed by the vice chancellor on account of their delay in instituting the suit.

An equitable claim, upon which a bill in chancery could have been filed previous to the first of January, 1830, and where the complainant was under no legal disability, is barred, by the provisions of the revised statutes, at the expiration of ten years after the revised statutes went into operation.

The old statute of limitations is only applicable to suits in equity for claims as to which the right to sue existed previous to January, 1830, where there is a concurrent jurisdiction, at law and in equity, in reference to the subject of the suit; but it does not apply to cases which are exclusively of equitable cognizance.

THIS was an appeal from a decree of the vice chancellor of the eighth circuit, dismissing the bill of the complainants, under the following circumstances.

In May, 1808, Theodore Sedgwick contracted with Derick Spoor to convey to him a lot of land in the county of Ontario, for the price or consideration of \$200. Which sum Spoor covenanted to pay as follows: \$100 on the first of January, 1809, \$50 on the first of January, 1810, and \$50 on the first of January, 1811, with interest on the whole annually from the 12th of September, 1807. It was also stipulated in the contract that if Spoor should fail in the performance of any of his covenants to make the payments, Sedgwick should be discharged from his covenants to make the conveyance. Spoor paid \$3 upon the contract at the time it was made, and being then in possession of a squatter's right, he continued in possession until the time of his death, on the first of November, 1810; making some slight improvements upon the lot, but without paying any thing beyond the \$3, either for principal or interest on the contract. At the time of his death Derick

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Spoor left a widow and three children surviving him ; the eldest of which children, A. Spoor, was about five or six years of age, and the youngest, Gerrit Spoor, was but a few weeks old. Derick Spoor left some personal property at the time of his death, worth from \$150 to \$200, including a span of horses which he had bought partly in exchange for a yoke of oxen, either lent to him by his father-in-law, or purchased of the latter and not paid for. Without taking out administration on the estate of the decedent, the father of the widow disposed of the personal property, and paid the small amount of debts which his son-in-law owed. And after the death of her father which took place in 1811, the widow, with the proceeds of this personal estate and with about \$200 which came to her from her father's estate, paid the amount due on the contract, partly in 1812 and partly in 1814 ; and then took a deed for the 40 acres of land in her own name, in the month of January, 1814.

The widow of Derick Spoor, in 1815, intermarried with J. Russell, but she and her husband continued to reside on the forty acre lot, and to support the three children of her first husband, until the fall of 1819, when Russell died. In the meantime she and her husband had mortgaged the lot to the defendant, for \$250. In January, 1821, she sold and conveyed the lot to the defendant, for the consideration of \$600, including the amount due upon the mortgage, with covenants of seisin and warranty ; that being the full value of the lot, including the improvements made thereon both before and after the death of Derick Spoor. The notes of the defendant were taken for the balance of the purchase money, and were turned out by Mrs. Russell towards the purchase of another lot of 30 acres, for which she paid \$360 and took a deed in the names of her son Garret Spoor and of Chauncey Hinman, the husband of her daughter.

Her oldest son, Abraham Spoor, arrived at the age of twenty-one in 1825 or 1826, and died a few weeks before the filing of the bill in this cause in June, 1840, without having instituted any proceedings against the defendant, or otherwise, in relation to the lot ; leaving Cecilia Spoor one of the complainants, an

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infant, who was six weeks old at the time of the commencement of this suit, his only child and heir. Mrs. Hinman, the daughter of Derick Spoor, became of age in 1828 or 1829, and Garret Spoor in 1831.

*V. Matthews & J. C. Morse*, for the appellants.

*Walter Hubbell*, for the respondent.

THE CHANCELLOR. There is no evidence in this case showing how the three Sedgwicks, who gave the conveyance to Mrs. Spoor in 1814, were connected with Theodore Sedgwick, sen. who made the contract. But as their agent received the money on that contract, and executed the deed as their attorney, it may be fairly inferred that they had acquired the interest of T. Sedgwick, sen. in the land, as his grantees, devisees, or heirs; and were willing to ratify the contract, although they probably were not bound to do so, under its provisions. I think, therefore, that if the contract had actually been fulfilled for the benefit of the children, by a payment out of their funds, or by a donation from their mother for their use, they would, in equity, have been entitled to the lot; if they had asserted their claim within a reasonable time, and had not in fact received an equivalent therefor. But as their mother conveyed the property to Wells for a full consideration, with covenants of warranty and seisin, if they had no equitable claim as against the mother, it would be inequitable and unjust to permit them to recover the land from the defendant; and thus charge her with the value thereof through her covenants to the defendant.

Taking the facts as they appear, it is very evident that the mother has really paid the whole consideration for the land, either directly or indirectly; and that the complainants have no equitable claim against her on account of the sale thereof. As she has conveyed with warranty, and has received the proceeds of the land, and has invested a portion of the proceeds in

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other lands, for the benefit of two of her children, she and the lands conveyed to them should be first charged, before resort is had to the lands in possession of the defendant, to satisfy any claim the complainants may have on account of the Sedgwick contract. For the interest of the children in the 40 acre lot was a mere equitable right.

The father, it is true, left a very small personal property, some part of the proceeds of which may have been applied on the contract; but the whole could not have exceeded \$125, after paying the small debts and satisfying the claim of the estate of his father-in-law on account of the oxen. And the expense of supporting the three children until they were old enough to earn their livelihood, undoubtedly must have far exceeded that amount and their proportion of the use of the land. The annual value of the land, according to the testimony, exclusive of taxes, &c. could not have exceeded \$20. I am satisfied, therefore, that if an account had been taken between Mrs. Spoor and her children, in January, 1821, charging her with the value of the land and the fair rent thereof from the death of her husband, and crediting her with the purchase money of the 30 acres, which she bought with the proceeds of the 40 acre lot, and what she had paid out of her own money and earnings on the Sedgwick contract, there must have been a very considerable balance equitably due to her.

If the children had asserted their claims to this land, therefore, when they first became of age, although they might have had a technical right to an adjustment of their claim upon surrendering the 30 acre lot and accounting for their support and maintenance during their tender years, their right to relief would have been merely nominal. But as one of them had waited about fourteen or fifteen years, after he was of age and in a situation to assert his right, and the others had delayed asserting their claims from nine to twelve years after they were of age, and until their mother had probably become irresponsible, I think the vice chancellor was right in dismissing the bill on account of the staleness of the claim. Had they brought the suit and recovered the land from the defendant while the

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last husband was living, the defendant would have recovered back the consideration of the land with interest and the costs of his defence in a suit against him and his wife. Indeed, if the statute of limitations had been insisted on, in relation to the claim made by this bill in behalf of the daughter of A. Spoor, it is clear that her claim would have been barred by the provisions of the revised statutes. For this being a claim of equitable cognizance merely, the remedy was barred at the expiration of ten years after the revised statutes went into effect; as to Abraham Spoor who was then of age and under no legal disability. And I believe all this appears upon the face of the bill. The old statute of limitations is only applicable to rights of action accrued previous to the first of January, 1830, where there is concurrent jurisdiction at law and in equity. But where the court of equity has exclusive jurisdiction, the provisions of the revised statutes, relative to the time for commencing suits in equity which are not cognizable at law, apply. When no legal disability exists, the suit must be brought within ten years after the right to sue occurs, where the proceeding is to enforce a trust not cognizable in the courts of common law. (2 R. S. 301, § 52.) And where the right to sue existed previous to the time when the revised statutes went into operation, the suit, to enforce the performance of the trust, must be brought before the first of January, 1840, or the right is gone; unless the complainant was under some legal disability during the ten years, or some part of that time.

The decree appealed from in this case must be affirmed, with costs.

**SACKETT vs. GILES and others.**

Where a bill was filed by the wife, against her husband, for a separation from bed and board, on account of alleged cruel treatment, and the assignees of the husband's interest in the complainant's real estate were made defendants, and the husband died before a decree, but the wife had failed to make out a case which would have entitled her to a decree of separation if the husband had lived until the hearing; *Held* that the other defendants were entitled to have the bill dismissed, as to them, with costs.

The general liens of judgment creditors of the husband, upon the interest of the latter in the real estate of his wife, and which liens have not been converted into an interest in the land itself at the time of the filing of a bill by the wife, against her husband, for a separation, are subservient to the paramount right of the wife to the immediate use of the land; upon her substantiating her right to a decree of separation, for the misconduct of the husband.

But where the interest of the husband in his wife's real estate is sold, by virtue of an execution issued upon a judgment recovered against him, before a separation has taken place between him and his wife, and before the filing of a bill for a separation, by the wife, and when the parties were living together as husband and wife, the purchaser of such interest at the sheriff's sale is entitled to protection as a bona fide purchaser, where he had no notice of her right to a separation.

Where the interest of a husband in his wife's real estate is sold under a judgment recovered against him, his right to redeem the premises from the sale is at an end at the expiration of twelve months. And if the original purchaser, or a redemption creditor, obtains the legal title at the end of three months thereafter, the wife has no right to redeem, upon paying the amount of the original bid and interest; although she is then entitled to a decree of separation.

THIS case came before the chancellor for hearing, upon pleadings and proofs as to the defendants O. Thompson and W. C. H. Waddell, and upon the bill taken as confessed as to the other defendants. The principal object of the bill, originally, was to obtain a separation from bed and board, between the complainant and her husband J. H. Sackett. And the assignee in bankruptcy, and certain creditors of the husband who had recovered judgments against the husband previous to the decree in bankruptcy, were made parties, for the purpose of obtaining a decree declaring the right of the complainant to certain real estate, which had come to her by descen' from her father, discharged of the claims of the defendants by virtue of their judgments, or otherwise. But the husband of the complainant

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having died during the pendency of the suit, and the defendant O. Thompson having successfully opposed a motion for permission to her to discontinue without costs, the cause was brought to a hearing for the purpose of disposing of the question of costs.

*H. E. Davies*, for the complainant.

*W. S. Sears*, for the defendant Thompson.

*B. W. Bonney*, for the defendant Waddell.

THE CHANCELLOR. The bill in this cause was not filed until January, 1845, although it charges a series of acts of cruelty committed by the husband, against the wife, commencing as early as 1834, and terminating ten years afterwards; when the parties finally separated. The general liens of Thompson, and the other judgment creditors of the husband, upon the interest of the latter in the real property of his wife, and which liens had not been converted into an interest in the land itself at the time of the filing of the complainant's bill, are subservient to the paramount right of the wife to the immediate use of the land, upon her substantiating her right to a decree of separation for the misconduct of the husband. I had occasion to examine that question in the case of *Van Duzer v. Van Duzer*, (6 *Paige's Rep.* 366,) although that point did not directly arise in the cause then under consideration; and upon a re-examination of the subject, I see no reason to change the opinion there expressed.

But even if the alleged acts of cruelty on the part of the husband, previous to the recovery of the judgment under which the defendant Thompson became the owner of the husband's life estate in the property, had been sufficient to have entitled the complainant to a separation, Thompson is entitled to protection as a bona fide purchaser. The judgment of Raymond was recovered in 1840, and the husband's interest was sold, by virtue of an execution upon that judgment, as early as February, 1843; nearly a year and a half before the separation between

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the complainant and her husband. And the parties were still living together as husband and wife when the defendant Thompson redeemed and took the title to the premises in May 1844; without any notice that Sackett had ever treated his wife unkindly, or that there was any equity on her part which could affect the interest he was to acquire by the payment of the money which had been bid upon the sale under the prior judgment. The right of the husband to redeem the premises from the sale was at an end at the expiration of twelve months. It was therefore wholly immaterial to the wife whether the original purchaser, or the redemption creditor, obtained the legal title at the end of three months thereafter. For in neither case would she have the right to redeem the premises upon paying the amount of the original bid and interest.

Again; I think the complainant failed to show such a case of cruelty, on the part of the husband, previous to the decree in bankruptcy, as would have justified this court in decreeing a separation. No person was present at the time of the alleged blow in 1834, and the husband and wife differed as to the facts which occurred. If his statement was true, she was the aggressor; and his conduct, although not justifiable, was excusable. And no court having a due regard to the sanctity of the marriage relation, would decree a separation for that cause. It is true, the husband suffered the bill to be taken as confessed. But as the complainant waived the right to a sworn answer, no inference can arise, to the prejudice of third parties, by the neglect of the husband to make a defence. I think, therefore, that the complainant showed no right to interfere with the legal title to the husband's life estate in the part of the premises which Thompson acquired under the sheriff's deed in May, 1844; or in the residue of the premises, the legal title to which became vested in the defendant Waddell, as assignee under the decree in bankruptcy.

For these reasons the suit must have wholly failed as against the defendants Thompson and Waddell, in case the husband of the complainant had lived, and if she had succeeded in obtaining a decree of separation from him, on account of his cruelty to her,



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subsequent to the decree in bankruptcy. The complainant's bill, as to each of those defendants, must therefore be dismissed, with costs to be paid by the complainant.

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## JOHNSON and others vs. BUSH and wife.

[Distinguished, 27 Hun 205.]

The date of the incorporation of a company, under the provision of the revised statutes declaring that if any corporation created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation its corporate powers shall cease, is the time when the act creating the corporation takes effect as a law.

The fair construction of the act of April 14, 1838, amending the act to incorporate the Globe Fire Insurance Company, by which the directors named in the original act were continued in office until the 2d Tuesday of May, 1839, and were authorized to open the books of subscription again, and to receive subscriptions for the purpose of filling up the capital stock of the company, is that it extended the time for the organization of the company, and for the commencement of its business, one year; although that act does not in terms extend the time for the commencement of the business of the company.

An assignment, by the officers of a corporation, of a bond and mortgage exceeding one thousand dollars and constituting a part of its capital stock, is void; unless made in pursuance of a previous resolution of the board of directors authorizing such assignment.

But it seems that the proof by the subscribing witness to such an assignment, before the commissioner of deeds, that the corporate seal was affixed to the same by the authority of the corporation, is *prima facie* evidence that the assignment was authorized by the board of directors.

If an assignment of that nature is duly authenticated for the purpose of authorizing it to be recorded, it may be received in evidence, without further proof; subject, however, to the right of the adverse party to show that it was not duly executed by the corporation, because no resolution of the directors had authorized the person entrusted with the corporate seal to affix the same to such an assignment.

Where, by statute, a resolution of the board of directors of a corporation is necessary to authorize an assignment of corporate property by the officers of such corporation, a certificate of proof before the acknowledging officer that the corporate seal was affixed by the officer entrusted with such seal by the corporation, is not alone sufficient to authorize such assignment to be recorded, or to be read in evidence without further proof.

A corporation has no legal power to take a surrender of a part of its capital stock

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not for the purpose of issuing new scrip therefor to other persons, upon being paid or secured the amount of the same from them, but as an extinguishment of a part of the capital of the company, and to give up the property or effects of the company in exchange for the same. And the assignment of a bond and mortgage, held by a corporation, in pursuance of such an arrangement, being in direct violation of the provisions of the statute, the assignee will acquire no legal or equitable right to such bond and mortgage by such an assignment.

Where a corporation took from one of its stockholders a surrender of twenty shares of its capital stock, held by him, and endorsed the amount of the par value thereof upon a bond and mortgage which it held against him, and then assigned the residue of the debt secured by that bond and mortgage, to certain other stockholders, upon the surrender of the stock held by them; *Held* that both transactions were in direct violation of the provisions of the statute prohibiting the directors of any moneyed corporation from dividing, withdrawing, or in any manner paying to the stockholders any part of the capital stock of the corporation, without the consent of the legislature.

A deed executed by an attorney may be recorded, upon his acknowledgment before the proper officer, or upon due proof that such deed was executed by him; without proving the power under which the attorney acted in executing such deed.

THIS case came before the chancellor upon an appeal, by the complainants, from a decree of the vice chancellor of the eighth circuit, dismissing the bill of the appellants, with costs. The bill was filed to foreclose a mortgage given by Bush and wife to the Globe Fire Insurance Company, in 1839, to secure the payment of \$7000, being the amount of the purchase of seventy shares of the capital stock of the company, and for which scrip was issued to Bush and to others at his request, or by his direction. The act for the incorporation of the Globe Insurance Company was passed on the 2d of May, 1837, and became a law on the 22d of the same month, under the provision of the revised statutes on that subject. The first directors were named in the act of incorporation, and were to continue in office until the 2d Tuesday of May, 1838; when directors were to be chosen by the stockholders of the company. The stock of the company not having been subscribed and paid or secured, so as to authorize the corporation to organize and commence the transaction of its business, on the 14th of April, 1838, an amendatory act was passed continuing the directors, named in the original act of incorporation, in office until the 2d Tuesday of May, 1839. And the directors were authorized

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to open the books of subscription again, and to receive subscriptions from time to time, for the purpose of filling up the capital stock of the company, upon the like notice of each time of opening the books of the company as was required by the original act.

The deposition, required by the act of incorporation, that the whole capital stock had been paid in or secured to be paid, was made and filed the forepart of April, 1839; and the company thereupon immediately organized and commenced the transaction of the business for which it was incorporated. To enable the officers of the company to make the necessary affidavit, however, some of the stockholders had to subscribe for, a further number of shares of the stock, amounting in the aggregate to \$160,000; the whole of which stock was paid for, or secured to the company, in conformity with the provisions of the charter. But as some had subscribed for portions of the stock, who had neglected to furnish their securities therefor in time, and it was expected that others would desire to take a part of this stock as soon as the company was in operation, it was understood between the directors of the company and the respective subscribers of this last \$160,000 of the stock, that the other applicants should be permitted to become the owners of such stock upon paying the amount thereof, or on giving approved security therefor; to be substituted in the place of the securities given by the original subscribers for that part of the stock. The stock for which the bond and mortgage of Bush and wife were subsequently taken, was a part of this \$160,000; which had been subscribed for originally by D. E. Tylee. And the security of Bush and wife having been approved of, in August, 1839, by the counsel to the board, it was received in full of the stock, except as to 12 shares which were assigned to trustees, for the security of the company, until Bush should have made certain contemplated improvements upon the mortgaged premises whereby the value thereof would be enhanced. Of the other 58 shares, the scrip for eight shares was issued to Bush, and the scrip for the residue was given to the complainants at

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Bush's request ; and for which they credited the amount to the firm of which he was a member, at its nominal or par value.

About the commencement of 1840, the company, having met with considerable losses, resolved to wind up their affairs and call in their stock, by receiving surrenders of the stock and giving up the securities of the holders thereof ; taking the bonds of the stockholders for ten per cent of the amount, to cover any losses which had occurred upon the stock. Under this arrangement, the eight shares of the stock issued to Bush, and the twelve issued to the trustees for him, were surrendered to the company, and the amount of the par value thereof was endorsed upon the bond and mortgage. The complainants also surrendered their fifty shares to the company, and, with the assent of Bush, the company assigned to them the mortgage of Bush and wife ; the complainants giving their bond to the company for ten per cent on the whole seventy shares to meet anticipated losses. The assignment of the bond and mortgage to the complainants, upon the surrender of the seventy shares of stock, was under the corporate seal of the company, and was signed by the president and witnessed by the secretary thereof. And the assignment was proved before a commissioner of deeds, and was duly recorded. Upon proving it before the commissioner, the attesting witness, the secretary of the company, swore that the seal affixed to the assignment was the corporate seal of the company, and was affixed thereto by its authority. But no resolution of the board of directors, authorizing the assignment of the bond and mortgage to the complainants, was given in evidence ; nor was the secretary of the company, who was examined as a witness in the cause, asked by either party whether such a resolution was ever adopted, or how he knew that the corporate seal was affixed to the instrument by the authority of the corporation ; at the time he proved the execution of the assignment before the commissioner.

The vice chancellor decided that the assignment of the bond and mortgage to the complainants was illegal and void, because it constituted a part of an arrangement to surrender a portion of the capital of the company, in exchange for it, in violation

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of the statute on that subject. He therefore dismissed the complainant's bill.

The following opinion was delivered by the vice chancellor.

F. WHITTLESEY, V. C. The defendants insist that the charter of the Globe Fire Insurance Company had ceased to exist before it attempted to go into operation. The act incorporating it was passed May 2, 1837. It made the corporation subject to the provisions of chapter 18, part 1, of the revised statutes, so far as applicable. The 29th, 30th and 31st sections of that chapter, provide that the officers of such corporation, before it commences business, shall make and file in the office of the county clerk an affidavit that the whole capital stock has been paid or secured. And if such affidavit is not made and filed within one year from the time when the charter is granted, then the charter to be void. (1 R. S. 595.) This charter then, in effect, required the capital to be paid in or secured within one year from the date of the grant. The amendment passed April 14, 1838, does not, in terms, give a longer time. It provides for continuing the directors named in the former act in office until May, 1839, and for opening the books of subscription in pursuance of the sixth section of the former act. And in case the full stock is not subscribed for upon opening, to appoint other times and places for filling the stock. (*Laws of 1838*, 191.) It is urged that there are no precise words extending the time for filling the stock beyond a year; nor any language in the amended act which, by any necessary implication, would so extend the time, even if it could be deemed to be extended by any implication. The amendment became a law before the year from the passage of the first act had expired, and it is claimed that all its provisions are entirely consistent with the original limitation of one year. And that as the company was not organized until long after the lapse of the first year, the charter is void. And that any contract assumed to be made with a corporation which had no existence is void also. This is a question in which the company and its stockholders are deeply interested, and is of vital importance to

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them; and it would not be desirable to decide it in a collatera way between litigants who are strangers to the company, unless there was an absolute necessity for it. That necessity does not exist in this case as it is now presented. The present case can be disposed of upon more satisfactory grounds; and for that reason the question will be left open.

The defendants contend, further, that if the time for filling the stock was extended by the amended act, it was not filled within the additional year, from the passage of that act. For they claim that the subscription by Graham and others of \$160,000 was not *bona fide*, or, if *bona fide* in a certain sense, that the withdrawal of the securities paid for it, and the substitution of the mortgage of the defendants and others, was a withdrawal of capital; which was illegal and void. Upon this point I understand from the testimony that Graham and others subscribed for \$160,000, to fill the capital and enable the company to go into operation; that they either paid or secured this subscription in the same manner as the other subscribers, and to the satisfaction of the directors; as indeed they must have done, before the officers could make the affidavit required by the revised statutes preliminary to commencing operations. While these subscribers were legally bound to pay for this stock, or rather bound to pay the securities which they had given for it, and they had a legal right to claim this stock as their own property, there was yet an understanding, not legally binding upon any one, that if other stockholders should apply, who could give approved securities, such applicants should be supplied from this special stock, and should pay or secure the company, and that the securities of Graham and others should be diminished to that amount. Bush was supplied out of this reserved stock; and I can see nothing in all this transaction, so far as it appears from the testimony, which was improper, or in violation of any law. We must assume, in the absence of positive proof to the contrary, that the subscription for the \$160,000 was made *bona fide* and was fairly secured; and it is not urged that the mortgage substituted by Bush was a weak security given in lieu of a valuable one withdrawn. 11

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indeed available securities for the capital stock were withdrawn and nominal securities substituted, it would be a fraud upon the other stockholders, and bring it within the case of *Nathan v. Whitlock*, (9 *Paige*, 152.) But I do not deem such to be the case in this instance; and I see no reason to question the validity of the mode of proceeding which was adopted.

Another objection taken by the defendants is as to the validity of the assignment from the company to the complainants. One of the provisions of the revised statutes as to moneyed corporations is, that no conveyance, assignment or transfer, not authorized by a previous resolution of the board of directors, shall be made by a corporation, of any of the real estate, or any of its effects exceeding the value of one thousand dollars. (1 *R. S.* 691.) This assignment is executed by the president and secretary of the company and the corporate seal affixed, and is proved before a commissioner of deeds, to enable it to be recorded. The secretary, by whose oath it is proved for that purpose, swears that he affixed the seal by authority of the corporation. The instrument itself, thus proved, is all the proof of the assignment which is offered. No previous resolution of the board of directors authorizing the execution of this instrument is produced. I am of the opinion that the proof thus offered of the conveyance of the interest of the company in this mortgage to the complainants is insufficient. But this defect in proof might possibly be cured if the facts enabled the complainants to do so at the expense of some costs. (6 *Paige*, 54, *contra*.)

There are however more serious objections to this assignment. The complainants were the owners of fifty shares of the capital stock of this company; and the bond and mortgage executed by the defendants were so executed in payment of seventy shares of the capital stock of the same company. The consideration for the assignment of this bond and mortgage, was the surrender, cancellation and destruction of those fifty shares of capital stock. The bond and mortgage represented so much of the capital of the company; and its cancellation to the extent of \$2000, and its assignment for the

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remainder, was in effect a withdrawal of so much capital of the company, without legislative authority or judicial direction. This court held, in the case of *Pettibone v. Hawkins*, that the directors of a banking association had no power to contract to give up securities held by them in payment for subscriptions to their own stock, upon the surrender and cancellation of such stock. And in another case, (*Mather v. Bates*), it was decided that the directors had no power to make such a contract, even by the direction of a majority of the associates at their annual meeting. This was decided in relation to associations which were considered not to be subject to the provisions of the revised statutes in relation to moneyed corporations; but it was so held upon general principles. Insurance companies and moneyed corporations are subject, expressly, to the provisions of the revised statutes. Among those provisions is the following: "It shall not be lawful for the directors of any moneyed corporation to divide, withdraw, or in any manner pay to the stockholders or any of them, any part of the capital stock of the corporation, or to reduce such capital stock, without the consent of the legislature, or to receive any shares of capital stock in payment or satisfaction of any debt due the corporation," with certain exceptions. This bond and mortgage was a debt due to the corporation; it was a part of its capital stock. The company received from the complainants fifty shares of its own stock for this debt; and by the assignment of the debt, so much of the capital stock was withdrawn. This whole transaction seems to come within the plain prohibitions of the statute; and shows an attempt on the part of this corporation to withdraw and reduce its capital stock, and so far to wind up its concerns without the authority of the legislature, or the sanction of a judicial tribunal. This is clearly forbidden. (*Ward v. The Sea Insurance Co.* 7 Paige, 294. *Nathan v. Whitlock*, 9 Id. 152.) And from the ordinary consequences of such acts forbidden by statute the assignment must be held to be void.

The complainants thus fail to maintain the title to the bond and mortgage, which they have set up in their bill. And con-



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sequently their bill should be dismissed. It is accordingly dismissed with costs.

*Geo. Wood*, for the appellant. I propose, in the first place, to answer the grounds on which the court below reposes, in support of the decree appealed from. The first point decided by the vice chancellor is, that it does not appear that the assignment of the bond and mortgage in question was made to the complainants, under a resolution of the board of directors, according to the provision of the revised statutes. The seal of the corporation is affixed to the assignment, with the signature of the president and secretary; all which is proved and recorded. It was not necessary to produce the original resolution, or to produce and prove a copy. The seal, with the correspondent attestation, being proved, is sufficient. This was so held by the chancellor in *Lovett v. The Steam Saw Mill Association*, (6 *Paige*, 54.) It is a well settled principle that the proof of the seal is evidence, *per se*, that the previous authorization was complied with. The fallacy in the views of the vice chancellor results from his mistaking the object of the statute. The object of the act was to prevent officers of corporations from disposing of the real estate and effects, under mere general agencies; and to require that they should have a specific resolution of the board to that effect. The act did not design to change the rule of evidence. An authority to affix the seal was just as necessary before the passing of the act as since; and if affixed without authority it was void. If before the act, an instrument with the corporate seal affixed had been produced in court, it might have been read in evidence upon showing it was sealed with the seal of the corporation. But it would have been competent for the other party to show that the seal was put there without authority, by a person not authorized. The same course of proceeding will take place now. The party alleging the want of authority must show it now, after the proof of the seal, as before the passing of the act. The same sort of circumstantial evidence will be allowable to him in proving a negative act, viz. the want of authority. In making out this

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fact of authority, the change made by the statute operates. Now it must be by a specific resolution of the board ; before, it was by general authority, which might be shown by mere usage. This construction is conformable to the decision of the chancellor before cited, and is conformable to usage. It has not been the practice, under the act, to make proof of this specific resolution, in order to have deeds and mortgages recorded. The proof, as taken in this case, has always been deemed sufficient.

The vice chancellor's second ground is that the contract and arrangement under which the bond and mortgage were assigned by the company to the complainants were illegal, against the policy of the statute, and void. To this I answer, in the first place, that it was not against the policy of the statute ; that the object of the act was to prevent directors from thus assigning the assets of the corporation and taking stock in lieu thereof—but it might be done by them if approved of by the stockholders and creditors of the company ; which I am informed was done in this case.

But I deem it unnecessary to enlarge upon that view of the case. I shall now assume the assignment of the bond and mortgage to have been made under an illegal contract. No doubt this bond and mortgage were good and binding against the defendants. They were executed as well by the wife as the husband, and there is nothing in the proofs to impeach them. The assignment was complete ; fully executed and delivered. The effect of this assignment, thus executed, was to pass to the plaintiffs the complete title and interest in the bond and mortgage. (*Raymond v. Squire*, 11 *John. Rep.* 47. *Moore v. Trumbull*, 5 *Cow.* 488.) The contract under which the assignment was made, was completely executed on both sides ; the company got the full consideration, and the appellants got a complete title to the bond and mortgage. If the transaction was infected with illegality, both parties were in *pari delicto*, or at least, the fault on the part of the company who transferred was as great as that of the appellants, if not greater. When the parties are in *pari delicto* and the contract is executed, it is well settled that neither party can rescind it.

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(*Vischer v. Yates*, 11 *John. Rep.* 28. *Comyn on Contracts* 109, 120. *Chitty on Cont.* 214, 192, 3. *Yates v. Foot*, 12 *John. Rep.* 1. 8 *Id.* 575, 120. 2 *Cow. & Hill's Notes*, 1446. 3 *Taunt.* 277. *Douglas' Rep.* 470. 8 *East*, 381, n. 2 *Bos. & P.* 467. 4 *Camp. Nisi Prius Rep.* 37, 157.) In case of illegal contracts, where money or goods are delivered, not to the party to the contract, but to a third person to be appropriated to his use, the third person cannot object to paying them over; nor can they be recovered back. (1 *Bos. & P.* 3, 4, 296. 1 *John. Cases*, 158. 12 *John. Rep.* 1. 11 *East*, 52. 3 *Price*, 58. 2 *Barn. & Ald.* 642.) Money is not recoverable back when the contract is executed, and the parties are in *pari delicto*. (*Chit. on Contracts*, 638. 3 *Term Rep.* 266. 8 *Id.* 575.) The defendants, as mortgagors, must pay to somebody. All they can ask is to be protected in the payment of the debt to the holder. If the company, who were the original holders of the bond and mortgage, cannot get them back from the appellants, the latter have the right to hold and collect them. The title is in them, as against the company. Of course the defendants will be protected in paying to the appellants; which is all the defendants can require.

Even where a third party is in some measure mixed up with the illegal contract—as where he has received money or property under it, to be delivered from one party to the other in the original contract—his position in respect to it being one remove from the illegal contract, the property delivered cannot be recovered back from him. On the other hand, he cannot be protected from paying it over. (*Story on Agency*, 354, 356.) But the debtor in this bond and mortgage was not at all participant in the illegal assignment. He owes the debt, and has a right to be so far protected as to be able to make a final payment without further recourse to him. This he can do, as I have clearly shown, by paying it to the appellants, who are the holders thereof. A third party cannot object to a contract, where the parties to it have gone too far for themselves to object. And generally speaking, a third party cannot take the objection when he is not in any wise concerned in the performance of the con-

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tract. (6 *Term Rep.* 557.) Jurists are sometimes led astray by assuming an analogy between such cases as this and assignments infected with usury. It has been a mooted question whether the assignee, in the latter case, takes such a title as will enable him to recover. But the analogy does not hold. The parties to the usurious agreement do not stand in contemplation of the usury law on equal grounds—in *pari delicto*. The borrower is considered the party aggrieved, and the design of the law is to relieve him; and hence the assignee may impeach the assignment which is infected with usury. But the cases are by no means uniform on this point of usury. I think therefore, the vice chancellor erred in supposing that the complainants, as assignees and holders of this bond and mortgage, had not such a title as would enable them to recover against the defendants.

Some other points were raised before the vice chancellor, though not passed upon by him, but which may be again presented on the other side, upon the appeal, for the consideration of the chancellor. It was contended that the affidavit that the whole capital stock was subscribed for and paid, or secured, was not made within one year from the passing of the act of incorporation; as required by the statute. (1 *R. S.* 595.) The act of incorporation was passed on the 2d of May, 1837. The amended act was passed 14th April, 1838; and provided for continuing the directors named in the former act, in office until May, 1839, and for opening the books of subscription in pursuance of the 6th section of the former act; and in case the full stock was not subscribed upon one opening, to appoint other times and places for filling the stocks. It is contended on the part of the defendants that the amended charter does not extend the time for filling up and paying for the stock; and the vice chancellor appears to consider it a very grave question and very important for the stockholders. I presume it will not be pretended that such an extension of the time, for subscribing and paying for the stock, must be found in express words in the statute. It may be implied, if the whole contents of the amended act will fairly warrant the implication. Rights and privi

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leges may be implied in an act conferring a franchise, as well as in any other statute. Does the amended charter, then, warrant such an implication? If not, why does it continue the original directors another year? Why provide for opening the books, pursuant to the sixth section of the original charter, and for appointing other times for opening them? Surely all this was not done to enable them to fill up the subscriptions and pay for the stock within the first year. That was already provided for in the original act. These various provisions in the amended act are all senseless and absurd, unless the legislature meant thereby to extend the time, for subscribing and paying, beyond the first year. And if they did mean so to extend it, they manifestly meant to continue it thus the second year, during which the original directors were to continue in office. The object of so continuing them in office for the second year was to enable the subscriptions and payments to be made; and the time for doing so must of course be held to be co-extensive with the continuance of the directors for that purpose.

Another point raised in the court below was, that the arrangement under which the bond and mortgage were assigned to the complainants, was infected with usury. To this I answer that there was no loan, direct or indirect. On the contrary, the assignment was made under an arrangement which did not at all partake of the character of a loan. The whole transaction shows this. To constitute usury there must be a loan. (*Comyn on Usury*, 22, 59. *Ord on Usury*, 29.) The agreement for the assignment in this case was complete at the date of the assignment. The rights of the respective parties to the property to be transferred, were mutually recognized by both parties at that time. The delay occurred for the convenience of the parties in carrying out their arrangements. If any profits or dividends accrued upon the stock in the meantime, they enured to the benefit of the company. Arrangements of this kind, where there has been some delay in carrying them out, and they are referred back to the time the contract was considered as complete by the parties, ought not to be considered usurious, where it appears from the whole complexion of the case to be

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bona fide, and not a cover for usury. (*Dowdall's ex'rs v. Lenox*, 2 *Edw. Ch. Rep.* 272.) Usury, in this case, was not properly pleaded. Both at law and in equity the usurious agreement must be specifically set forth. (*Comyn on Usury*, 203. 8 *Paige*, 452.) The usurious agreement in this case is not set out with the particularity required by the rules of law. And surely there is nothing in the defence, in this case, which entitles it to any extraordinary indulgence.

*S. Mathews*, for the respondents. The bond and mortgage, which are the subject of this suit, are not valid, because the Globe Fire Insurance Company, the mortgagee named in the mortgage, was not a legally constituted corporation, and was not therefore capable of taking the bond and mortgage in question. By the revised statutes, (*vol. 1, p. 600, § 7*,) it is provided that if any corporation thereafter created by the legislature, shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate power shall cease. The act incorporating the Globe Insurance Company was passed May 2, 1837. (*Laws of 1837, p. 328*.) It is in proof that the company did not organize nor commence business until some time in April, 1839; nearly two years after its incorporation: so that unless the complainants can show some other act of the legislature repealing the above 7th section of the revised statutes, or exempting that company from its operation, it is clear that it was not a corporation, at the time the mortgage was executed. The complainants contend that the act of April 14, 1838, (*Laws of 1838, p. 191*,) has the effect of a re-enactment of the act of 1837, or of re-incorporating the company as of the date of the last act. It will be necessary to examine the provisions of the act to see whether it will bear such a construction. The act is entitled an act to amend, &c. the act of 2d May, 1837. The first section is in these words, "The persons named in the first section of the act entitled, &c. to which this is an addition, shall continue in office as the first directors of such corporation until the second Tuesday of May 1839." The second section provides that the

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books of subscription may be opened a second time, and oftener if the whole capital shall not be subscribed at the time first appointed; and refers to the 6th section of the act of 1837, for the mode of receiving subscriptions and giving notice. Now there is nothing in this act of 1838, which conflicts with the 7th section of the revised statutes. The language of that section is clear and explicit. The charter of this company was received by the incorporators upon the condition there imposed, and there is nothing in the act of 1838 to release them from it. Continuing the directors named in the first act in office for another year, is no evidence that the legislature intended to release the condition; because directors are frequently continued in office beyond the year, by original acts of incorporation. Indeed this was done by the charter of this same company. By the 2d section of the charter, the first directors were to hold their office until the second Tuesday of May, 1838, a week at least, and perhaps longer, after the expiration of the year within which the company was required to organize, or in default thereof to forfeit their corporate powers. The only operation of the act of 1838, was to amend the act of 1837, in the two particulars of continuing the directors in office for two years, instead of one, and of allowing the books of subscription to be opened a second time, after a failure to fill up the capital stock on the first opening; and the two acts taken together must receive the same construction as if the whole had been contained in the first enactment. It is said, on the other side, that the provisions of the act of 1838 are senseless and absurd, unless it was the intention of the legislature to extend the time to fill up the capital stock. But it will be seen that there was at least eighteen days after the passage of the last act within which the company might have filled up the stock, and have gone into operation. There was therefore ample time for that purpose. If the company had done so, the provision enlarging the term of office of the directors would have harmonized perfectly with the other provisions of the charter, and with the revised statutes. The counsel asks, why provide for opening the books pursuant to the 6th section of the original charter

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and for appointing other times for opening them? I answer, that the original charter did not appoint "*other times*," and for that reason an amendment was necessary. It is possible, indeed I may say it is highly probable, that the directors had, before the passage of the last act, opened the books and had failed to obtain the subscriptions required; and they needed this amendment, therefore, to enable them to appoint another time. If I am right in a previous suggestion, this amendment had the effect of enlarging the powers, as conferred by the 6th section of the original charter, by authorizing the directors to appoint a second time for receiving subscriptions, after the first had failed. The original charter was certainly defective in that particular, and needed amendment. This is not a case where it can be said that the legislature had waived the forfeiture; because there was no forfeiture when the amended act of 1838 was passed, nor was a forfeiture at that time inevitable. Where the legislature intend to renew an act of incorporation, the language is explicit; and is remarkably uniform in all the cases which I have examined. (*See Laws of 1837, ch. 393, 398, 405, 464; Laws of 1838, ch. 283, 303, 311, 322, 147, 167, 168.*)

The capital stock of the company was never fully subscribed and secured, so that although the affidavit required by law to be filed, was made and filed, yet the testimony shows that this was a fraud upon the law. It appears from the testimony of Allen and Martin, the president and secretary of the company, that subscriptions were made by some of the directors to the amount of \$160,000, to enable the company to go into operation; and that it was agreed between the board of directors and those gentlemen, that other subscriptions and other securities might afterwards be substituted. The act doubtless contemplated a bona fide subscription to the capital stock, and a bona fide payment or security of the amount subscribed. But the subscription in this case was qualified and conditional. The subscribers had a right, by their agreement with the directors, to withdraw their subscriptions and substitute others. The object of the law might, in that way, be wholly defeated. The



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president and secretary might make the required affidavit, and then other subscriptions and securities might be substituted, of a quality far below the standard prescribed by the law. If the principle be once admitted that a proceeding of this kind is lawful, it opens a door for the greatest frauds. It appears, by the evidence, that the agreement between the directors and the subscribers of the \$160,000 was carried out; for these subscriptions were afterwards actually given up, and others substituted. Bush's subscription of \$7000 was one of the substituted subscriptions; and the application was made to the directors directly, and the stock was issued to him. This shows most clearly that the subscriptions of \$160,000 were not real or bona fide. It was a mere temporary expedient, and the whole arrangement was intended to give a fictitious existence to the corporation. We say it was a fraud upon the law. The law contemplates a bona fide subscription, and so as to give to the public, and those dealing with the corporation, the security of a real and substantial capital. If, therefore, the subscriptions were a fraud upon the law, the company had no existence when the mortgage of Bush was given; and the mortgage is accordingly void.

But if the subscriptions of Graham and others were valid and the securities given by them were also valid, those securities formed a part of the capital of the company, and could not be withdrawn. The mortgage of Bush and wife having been given on the withdrawal of so much of the securities of Graham and others, and being substituted therefor, the transaction was illegal; and the bond and mortgage in question were without lawful consideration and were void. The bond and mortgage were not actually consummated until the 27th of August, 1839; though they purport to bear date in April previous. August was the time of the actual delivery, and when they first had an available legal existence. This corporation is a moneyed corporation, as defined by the revised statutes, and could not commence its business until the officers made and filed an affidavit that the whole capital had been paid in, or secured, according to the terms of the charter. This affidavit must have been filed

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in April, 1839; before the bond and mortgage of Bush and wife was given. If then the \$160,000 subscribed by Graham and others, and the securities given therefor, formed a part of the capital subscribed and secured, and on which the affidavit of the officers was predicated, neither the subscriptions nor the securities could be given up and others substituted, without the consent of the legislature. The revised statutes (1 *R. S.* 591) expressly prohibit it. (*See also Nathan v. Whitlock*, 9 *Paige's Rep.* 152.) The effect of this transaction was to surrender \$7000 of the original securities taken by the company, and substitute others in their stead. The original subscription too, to that extent, was cancelled, as must be inferred, and the subscription of another person substituted. If this should be allowed, why may not the whole object of that provision of the revised statutes be defeated? What security have the public, from the making and filing the affidavit, if the next day the directors may surrender all the securities on which it was predicated and substitute others? The charter requires that the mortgages taken for the capital stock shall be upon real estate worth fifty per cent more than the amount charged thereon. What security then have the public that the new securities will be of that character? If the corporation had been legally constituted and the whole capital had been subscribed, the company could not issue any more stock. The issue of \$7000 of stock to Bush, therefore, was an excess, beyond the capital, which the company had no power to issue; and the security given for it was without consideration and void.

Again; the assignment of the bond and mortgage to the complainants by the Globe Insurance Company is void. There was no resolution of the board of directors authorizing the assignment. And the assignment having been made on a surrender of the stock of the company, it was a withdrawal of so much of the capital of the corporation, and was contrary to law and void. The revised statutes (1 *R. S.* 593, § 8) declare that no conveyance, assignment or transfer, not authorized by a previous resolution of the board of directors, shall be made by any moneyed corporation, of any of its real estate, or of any of its

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effects, exceeding the value of \$1000. There is no proof in this case, that the assignment of the bond and mortgage to the complainants was authorized by a previous resolution of the board. The certificate of the commissioner is no evidence of the fact, even if it certified so much; because it is not the kind of proof required. It is not the mode of proving such a fact, in this court. That might do in the case of an ordinary corporation to which the statute did not apply; because in such cases a resolution of the board of directors or trustees is always, or generally, implied, when the instrument is executed by the proper officers under the corporate seal. But in the case of moneyed corporations, the legislature evidently intended to impose a special and salutary restraint, upon the assignment and transfer of their effects by the officers of such corporations. The counsel for the appellants has attempted to show that it was unnecessary to prove this resolution, and he cites, as an authority in support of this position, the case of *Lovett v. Steam Saw, Mill Association*, (6 *Paige's Rep.* 54.) But that was a case of an ordinary corporation, and to which the statute did not apply. The evidence in such cases is governed by the rules of the common law. And while at the common law a resolution is necessary to authorize a grant or conveyance, yet the courts, in giving effect to conveyances of corporations, always presume a resolution when the seal is affixed, with a proper attestation. The statute has changed the rule in respect to moneyed corporations, and the legislature did not mean to leave it to mere implication. The resolution in such cases forms an essential and indispensable part of the assignee's title. It is a condition precedent, and should be proved. The resolution should have been stated and set forth in the bill. It is a well settled rule of pleading, in this court, that the complainant must set forth in his bill his interest in the subject matter of the suit, or a right in the thing demanded, and a proper title to institute a suit concerning it. (*Mitf. Plead.* 154. *Story on Plead.* 214, & 257. 1 *Mylne & Keene*, 61. 1 *Molloy*, 603.) In the last case, the rule as above laid down is recognized, but the words "*duly authorized*" were held to be sufficient in the bill. The

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bill in this case does not set forth, nor refer to, the resolution. It merely states that the company assigned the bond and mortgage. The resolution therefore is not put in issue. And will the court imply its existence when it has neither been put in issue nor proved? I think not; and I therefore insist that not only is there no proof of the resolution, but that the bill is defective, and so much so, that no proof could supply it. The appellants' counsel seems to suppose that the object of the statute was to prevent officers and agents of corporations from disposing of the real estate and effects under mere general agencies. I think the object and policy of the statute was to protect the stockholders from the loose practice which had obtained, of making transfers and conveyances by the officers of corporations, without the deliberate sanction of the board of directors. It is notorious that such a practice had prevailed in many of our banks and insurance companies, to the great injury of the stockholders and of the public. The legislature intended to correct the evil, and to prevent, as far as this enactment would do it, the officers of corporations from wasting the funds of their institutions. They are now required to have the sanction of the board of directors to all transfers of real estate and other effects of the value of \$1000. But whatever may have been the intention of the legislature, or whatever may be the policy of the enactment, the letter of the law is plain and positive, and cannot be disregarded.

The assignment having been made on a surrender of the stock of the company, it was a withdrawal of so much of the capital of the corporation, and was therefore contrary to law and void. I have before shown that the company were prohibited by law from withdrawing any part of their capital stock, without the consent of the legislature. Indeed, the statute on this subject is so plain and unequivocal that no argument in support of the position is necessary. The only question under this point is, whether the circumstances under which the assignment of the bond and mortgage, and the surrender of the stock by the complainants were made, amount to a withdrawal of the capital. Assuming, for the purpose of this part of the

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argument, that the bond and mortgage was a valid security in the hands of the company, it then formed a part of the capital of the corporation. It was given, as the appellants insist, for the stock of the company. It was, as they say, an original security for so much subscribed to the capital stock. It was assigned to them on a surrender of the stock for which it was given. The amount of the bond was in the first place reduced by an endorsement of \$2000 on a surrender of that amount of stock by Bush, and the balance of the security was assigned to the appellants. Now here was a clear withdrawal of so much of the company's capital. The funds and assets of the corporation were diminished by the operation to the amount of \$7000, and this \$7000 formed a part of the capital. The security of the creditors of the corporation was lessened just so much. It is the very case to which the statute was intended to apply. The counsel of the appellants seeks to avoid the effect of this argument in two ways. He insists, in the first place, that if the contract was illegal, and the assignment therefore void, yet, as the company and the assignees were *in pari delicto*, the company cannot for that reason question the validity of the assignment, nor rescind the contract; so that the defendants would be perfectly protected in the payment to the complainants. And he seems to suppose that this is all that the defendants can require. It is by no means certain that the title of the appellants cannot be defeated. I admit that one party to an illegal contract, as a general rule, cannot set aside or rescind an illegal contract as against a *particeps criminis*. But what should hinder the stockholders or creditors of this defunct and perhaps insolvent corporation, from setting aside this contract and reclaiming this bond and mortgage? Most certainly, if our position is correct, that the effect of the assignment was to withdraw so much of the capital of the corporation, the appellants would not be protected by their assignment, against the claims of a receiver appointed on the application of the stockholders or creditors. (*Nathan v. Whitlock*, 9 Paige, 152.) The rule to which the counsel refers has no application to the present case. The ground of the objection is, that because the

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assignment to the complainants in the present case was made in violation of law, it cannot be set up by them to support their title to the bond and mortgage. The rule is that, as between the parties to an illegal contract, the court will not aid either, in enforcing it, if not executed, nor allow either to rescind if executed. (2 *Pothier by Evans*, App. No. 1. *Holman v. Johnson*, Cowp. Rep. 343. *Perkins v. Sawyer*, 15 Wend. 412. *Nellis v. Clark*, 20 Id. 24. *Bolt v. Rogers*, 3 Paige, 154.) The parties are *in pari delicto*, and the court will not lend its aid to either. But the real question here is, whether the appellants, being parties to the original illegal contract, on which the assignment was predicated, can claim any thing under that assignment. They doubtless would, as against their assignor, be left in possession of the security; because the court would not interpose to set it aside for his benefit. But the assignees claim to set it up, and to make title to the bond and mortgage through it. Their right to sue in this court depends upon their showing a valid title to the bond and mortgage from the Globe Insurance Company. If the contract on which the assignment was predicated was unlawful, they have no valid title to the bond and mortgage. (*Bank of U. States v. Davis*, 2 Hill, 451, 458, and the cases before cited.) Judge Story states the rule upon the subject with much clearness, in a note to his work on Agency. (*Story on Agency*, 360.) Another ground taken by the appellants' counsel is that the defendants not having been parties to the original illegal contract cannot object to its illegality. It might be argued, if it was necessary so to do, that Bush was in fact a party to the illegal contract and *particeps criminis*. Because, from the evidence, it appears that the bond and mortgage was originally for \$7000; that Bush surrendered \$2000 of the stock, which he had never agreed to transfer, and which was endorsed as payment on the bond and mortgage, and the appellants surrendered the other \$5000 which Bush had transferred to them; and upon this the assignment was made. Now this was all one transaction. It was all done at one time, and by a mutual agreement between the company, the appellants, and Bush. It will be seen, from

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this evidence, that Bush negotiated the transfer of the bond and mortgage, and was in fact a party to the contract. (*Story on Agency*, 356, § 347.) Again ; a third party may object to an illegal contract. It is so in the case of usury ; and there is no reason why it may not be done in every case of illegal agreements. (*Post v. Dart*, 8 *Paige*, 639.) I differ with the counsel when he says there is no analogy between cases of this kind and usurious contracts. I do not understand the object of usury laws to be the protection of the borrower alone. I had supposed that these laws were founded in public policy, and that for that reason courts would not enforce usurious contracts, even against third persons, unless it was shown that the usury had been waived by the borrower. In this last feature, usurious contracts differ from other illegal agreements. But whether this is so or not, the position before taken, that the appellants cannot recover without setting up and making title through the illegal contract, is a sufficient answer to the counsel's argument. In the case of *Bank of U. States v. Davis*, the party objecting to the illegal contract was not a party to the contract, and yet his right to make the defence was conceded.

The mortgaged premises, in this case, being of the separate property of Mrs. Bush, she stands in the relation of surety for her husband. There was a diversion of the mortgage from the object for which it was made and executed by Mrs. Bush, and the appellants cannot therefore have a decree except for a sale of the life estate of Bush. The testimony shows that the property mortgaged was the separate property of Mrs. Bush. It was a part of her inheritance from her father Isaac W. Stone. She was therefore a mere surety for her husband. (*Hawley v. Bradford*, 9 *Paige's Rep.* 200.) There was a diversion of the mortgage. The mortgage was given to enable Bush to procure stock from the Globe Fire Insurance Company, which was to be applied to the making of improvements upon her property. The stock was to have been issued to Bush. But instead of this being done, it was actually issued to the appellants, in satisfaction of a debt of the firm of Kempshall & Bush. The effect of the transaction was to make the mortgage pay a

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debt of Kempshall & Bush, instead of giving to Bush the possession of the stock. The rule on this subject is, that if by any agreement between the debtor and creditor, the situation of the surety is in any way changed, he is discharged. It is not necessary that the surety should show actual damage. It is sufficient that he may sustain damage. (2 *Ves. jun.* 540. 3 *Mad.* 226. 1 *Story's Eq.* 321. 10 *John.* 597. 7 *Paige*, 459, 614.) The object in obtaining the stock, as before remarked, was to enable Bush to improve the property of his wife. This the company well knew. Mrs. Bush had a right, therefore, to require that the stock should be issued to her husband, so that he might have the means of making the improvements. Her property would by that means be increased, and his life estate, in that event, might have been sufficient to pay the mortgage. Besides, if the stock had been issued to him, as between Mrs. Bush and the creditors of her husband, equity would have compelled the application of the stock to the making of the improvements, or failing in that, to the payment of the mortgage. In whatever aspect this case is viewed, Mrs. Bush has peculiar claims to the favorable consideration of a court of equity. In all the transactions of these parties her rights have been wholly disregarded. By a series of illegal acts her patrimony, which was pledged for a specific purpose, has, without her consent, been diverted to another; and if the appellants succeed in this suit, will be squandered in the payment of debts of an insolvent firm. If this could have been foreseen, or even suspected, her consent to such a pledge as she has given, would never have been obtained; and if there is any rule or principle of equity which can afford her relief, she is certainly entitled to it.

*Geo. Wood*, in reply. It is said the bond and mortgage are not valid, because the company is not a legally constituted corporation. It must be admitted, on all hands, that the company was organized under the charter, though its organization was defective in point of time. Assuming such defect to exist, the company did not in fact cease to exist as a corporation, but



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went on acting, performing business to a vast amount, in which great numbers of persons are involved. According to the old fashioned rules of construction, it would be held, in such a case, that although it was the duty of the persons composing the company, to cease acting when they failed to become completely organized within the year, yet, inasmuch as they went on, completed their organization, and transacted business from year to year, as a corporation, they were *de facto* a corporation, under a colorable organization, and their various acts and transactions with the public would be sustained until the corporation should be dissolved on quo warranto. This would be not only consistent with the rules of law, but would be a wholesome conservative course of procedure. I might here rest the case in regard to this point, were it not that prejudice against corporate institutions is the order of the day. The second answer to this argument is, that the statute of 1838 continued the period for organization for another year. It is said on the other hand, that it only continued the directors in office for another year. Why continue them in office? Why provide for opening the books once and oftener? Can it be seriously pretended that the legislature meant that these books should be opened on public notice, once, or *oftener*, and all within the space of eighteen days? The construction contended for does too much violence to the common sense of the legislature. It is said the first charter did not authorize the appointment of a second time for opening the subscription books, and therefore the amended charter was necessary. But as the first year had nearly run out, it was equally necessary to extend the time; and there can be no doubt in the mind of any person that the object of the legislature in continuing the directors, for the second year, was to give them a further time to complete their subscriptions and organization. Powers and rights may be implied; and the implication in this case is fair and reasonable. It is said in the next place, that the affidavit that the capital stock was actually paid or secured, called for by the 31st section of the statute, was a fraud upon the law, because it was not actually in good faith paid or secured. It is not denied that the subscriptions

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were *in fact* made, and the amount actually paid or secured, what then is the objection? Why that there was some understanding that the subscribers might get others to come in in their place; not men of straw, but good, efficient persons. I contend that there was nothing improper or illegal in this transaction. There was, in the first place, an actual subscription; liability, payment, and security. Such being the case, there could be no objection to their getting others to come in and step in their shoes, if the payments and securities were continued. Had the first subscription been fictitious, and not followed with an actual liability, there might have been some ground of objection to the regularity of the proceeding. A. attends a sheriff's sale; lands are struck off to him; he signs the articles pays the deposit, and complies in all things with the requirements of the law and the arrangements of the sale; but before the deed is given, B. steps in and assumes the purchase, pays the principal money, and takes the deed. Can it be pretended that this was not a valid sheriff's sale, whether B. came in under a previous or a subsequent understanding? If there had been a secret understanding that these directors subscribing were not to be liable at all, the affidavit would have been false, and a fraud upon the law; but that is not pretended. Assuming, however, that this substitution of a new bona fide subscription in the place of an antecedent subscription designed to be effected, was irregular, is it such an irregularity as would *ipso facto* annul the corporation? I think not. The affidavit was taken in good faith; there was a liability in the first subscription, and a *colorable* organization.

It is said, that supposing the subscriptions of Graham and others to be valid, the securities given by them became the securities of the corporation, and could not be withdrawn without violating some section of page 591 of the revised statutes, not named. I am aware of no section of the revised statutes which prohibits the withdrawing of the securities of a corporation and substituting others in their place, if the latter be good, where the thing is done in good faith, and without prejudice to the corporation. It is not alleged or proved that the substituted

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securities were not good, or that they were designed in any way to injure or prejudice the corporation, as was the case in *Nathan v. Whitlock*. The counsel asks, what security have the public from making and filing the affidavit if the directors may the next day surrender up the securities and substitute others? To this I answer, their security is complete if the substitution is fair, just and equal; otherwise not. It turns upon that question. If the substituted securities are defective, inadequate, or false, it is a fraud upon the corporation or upon the stockholders and creditors; and the original subscribers will be held responsible. But it cannot be claimed that the substituted securities do not belong to the corporation. If, however, there be any irregularity in these proceedings, affecting the organization of the corporation, the remedy must be by quo warranto; especially after a long course of action under such organization, involving in the shape of contracts and otherwise, the rights and interests of thousands. It is also objected that the certificate of the acknowledging officer is not evidence of the complete execution of the assignment of the bond and mortgage, but that the resolution of the board of directors ought to have been produced and proved. The general principle is not disputed, that proof of the seal is evidence that it was correctly affixed. Before the provision of the revised statutes, an authority to affix the seal was just as essential as afterwards. The only difference is, that formerly the authority might be general; now it is specific. But the statute has not changed the rule of evidence. The seal is *prima facie* evidence of the authority to affix it to the deed; as before. This *prima facie* evidence formerly could be overcome by showing, either directly or circumstantially, that there was no authority, either general or specific, express or implied. Now it may be overcome by showing that there was no such resolution of the board. This satisfies the whole requirement of the statute. Such has been the practice under this act in proving and recording of conveyances, of corporations, and it would be productive of infinite mischief to give the statute a different construction. The resolution may be essential, but the mode of proof is not altered.

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The counsel thinks it is not sufficient in pleading to allege the execution of an instrument, but that the particulars should be set out. This would not be required even in a common law declaration. When the legislature intend to introduce a new rule of evidence, they express their intention in clear terms. The object of the statute is satisfied by leaving the seal to be prima facie evidence as before, to be overcome by counteracting proof in reference to the resolution of the board. It is next objected that this arrangement for delivering up stock to the corporation in consideration of the transfer, and on which arrangement the transfer was made, was illegal, and that the complainants therefore have not shown any title by virtue of the transfer to the bond and mortgage. We have a regular transfer, which is good *per se* to pass the title, and it must stand, unless it is impeached. They seek to impeach it on the other side. They do this by going behind the transfer and showing that the contract which induced it was illegal. But is that sufficient? To this we answer, that the illegal contract has been consummated. The parties are in *pari delicto*; and that a consummated illegal contract, in respect to which the parties are in *pari delicto*, cannot be impeached. Therefore you cannot impeach the transfer by thus going behind it, in such a contract so consummated. If A. should sell to B. a horse upon some illegal contract, of which A. had received the fruits, and the horse was actually delivered, and the whole consummated, the title of B. to the horse would be full and complete. A. enters into an illegal contract with B. to convey him a tract of land upon some consideration which is illegal, but which is actually received, and the land conveyed by a deed valid on its face, the title cannot be impeached by going back to the illegal contract, if that illegal contract be consummated, and the parties are in *pari delicto*. All this doctrine has been too long settled to admit of a question. Shall a third person then impeach the title? Clearly not. Suppose the land to be conveyed should be subject to a tenancy, the rent passing by the conveyance. Can the tenant, in a suit against him for the rent, impeach the title of the grantee, when the grantor himself cannot go behind

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the conveyance to impeach it? The absurdity of allowing it would be too glaring. Suppose the assignor should sell, he could show no title against his own assignment. He could not impeach the transfer by going behind it to his illegal, consummated contract, in respect to which he is in *pari delicto*. But it is said that all this doctrine cannot apply to contracts and transfers or conveyances by corporations, because a receiver may afterwards be appointed, the corporation may become insolvent, and such receiver representing such creditors can rip up such illegal contracts. The corporation is the *entire* owner of the property. All the right and interest therein centre in the body politic, both at law and in equity. In suits in equity respecting mere pure equitable rights, as against third parties, the corporation represents the entire interest, and is the only party requisite to be brought before the court. A contract between the corporation and an individual is consummated when fully performed by the parties, as fully as in the case of individuals. All the rules and consequences applicable to and flowing from the consummation of illegal contracts between individuals are to be carried out and applied to such consummated contracts when made between a corporation and individuals. It is no answer to say that stockholders or creditors or receivers may in certain cases come in and object to such contracts. So in the case of individuals, the creditors of the individual may under certain circumstances come in and object, in courts of equity. But the equity in all these cases is collateral and contingent. It does not overturn the ordinary rule. If it did, it would be impossible to predicate consummation of any illegal contract. They, (the creditors, receivers, &c.) may not think it advisable to object. The contract may not be prejudicial to them. Unless, and until they do interfere, the rule in regard to consummation applies to the case, if it is an illegal contract. Suppose, in the case of such a consummated illegal contract between an individual and a corporation, the individual should seek in court to open it. Could not the corporation avail itself of the point, and would it be any answer, on the other side, to say, why possibly you may become insolvent,

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may have creditors, or a receiver may be appointed, the contract may be prejudicial to them, and they may seek relief? Clearly not. Such intervention is an exception to the ordinary rule, which is, that the body politic represents the entire legal and equitable interest; and if the individual would avail himself of the possibility of that objection he should bring him before the court.

The last point to be considered is, that the property upon which this mortgage was given belonged to Mrs. Bush, the wife, and that therefore, in respect to it she was surety for her husband. Be it so. Then she would have a right to come upon her husband's estate for indemnity. That is all. The cases go no further. If she was surety, and her husband the principal debtor, it of course follows, that the property obtained, and on account of which the mortgage was given, belonged to the husband; otherwise she could not have been his surety in respect to the debt. If it belonged to him he could of course dispose of it as he pleased, and might apply it as he pleased, and could pay off his honest debts with it. The counsel, the next moment, flies from this position of suretiship and maintains that the stock was obtained for the purpose of being applied to the improvement of this very land on which the mortgage rested. If so, then the stock itself for which this mortgage was given, must beneficially have belonged to the wife. If this was the case, how could the wife be the surety in the debt contracted in procuring that stock? The counsel has left this inconsistency unexplained. His argument is not only inconsistent, but his position is untrue in fact. It is not true there was any arrangement between the husband and wife that this stock should be applied in improvements upon the property. There was only a communication, and a very indirect one, of an intention on his part to apply it to that purpose. This is altogether different from any agreement between him and his wife that it should be so applied. Such an agreement, to have been of any effect, should have been in writing, and should have preceded the giving of the mortgage. But it stands without a particle of evidence to support it, and

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of course without a particle of evidence of any knowledge thereof by the corporation, or its officers, or of the complainants, the assignees.

THE CHANCELLOR. The first objection made by the defendants to the complainants' right to a decree of foreclosure, in this case, is that the bond and mortgage are void, because the Globe Fire Insurance Company, to whom they were given, was not a legally constituted corporation; inasmuch as it did not organize and commence its business within one year from the date of its incorporation. The seventh section of the title of the revised statutes relative to the general powers, privileges and liabilities of corporations, (1 R. S. 600,) declares that if any corporation created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease. The date of the incorporation, under this provision of the revised statutes, refers to the time when the act creating the corporation takes effect as a law; which, in this case, was on the twentieth day after the act of incorporation was approved by the governor. (1 R. S. 157, § 12.) And if the year for the commencement of the business of this corporation is to be limited by the date of its original incorporation, and without any extension, its powers ceased on the 22d of May, 1838; as its stock was not all subscribed for and taken until ten months after that time. I think, however, the fair construction of the act of the 14th of April, 1838, amending the original act of incorporation, is that it extended the time for the organization and for the commencement of business; although the act does not in terms extend the time for the commencement of the business of the company. That act took effect as a law on the 4th of May, 1838, only eighteen days before the expiration of the year from the time of the original incorporation of the company. It continued the directors named in the original act of incorporation in office one year from the time when their offices were to expire by such original act. It authorized the subscription books for stock to be again opened, from time to

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time, upon one week's notice on each occasion. It is wholly improbable, therefore, that the legislature expected or intended that the company should complete its organization, and commence its business, within the short space of eighteen days. And the fair construction of the amendatory act is that the company was to have one year from the time when that act took effect as a law, to complete the organization of the company and commence its business.

If the last \$160,000 of the stock of the company which was subscribed for by the Grahams and others, was subscribed for in good faith, with an intention on the part of the directors of the company that the subscribers should keep it and pay for it, unless it should be taken off their hands and paid for or fairly secured by others, the company was duly organized, within the time allowed by law for that purpose. And upon the evidence in this case, the vice chancellor came to a correct conclusion that the subscription for this \$160,000 of the stock of the company was legal. The corporation, therefore, was in existence and competent to take this bond and mortgage when it was delivered to the company in payment or security for the seventy shares of the stock of the company. And the bond and mortgage were valid securities, in the hands of the corporation, for the whole amount of \$7000, for which they were given to and accepted by the company; and as such, they formed a part of its capital stock.

Although the securities given for the \$160,000, subscribed by the Grahams and others, were a part of the capital of the company, and could not be withdrawn so as to reduce the capital, without authority of the legislature, or by a proceeding under the article of the revised statutes relative to the voluntary dissolution of incorporations, the directors of the company had full power to allow other good and sufficient securities to be taken as a substitute for that part of the capital stock of the company.

The objection that the assignment to the complainants was without a previous resolution of the board of directors, authorizing it, would probably be well taken if that fact had been



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properly brought before the court. But the proof, by the subscribing witness to the assignment, before the commissioner, that the seal was affixed to such assignment by authority of the corporation, appears to be prima facie evidence that the assignment had been authorized by the board of directors. For in no other way could the corporation authorize an assignment of its property, or effects, to an amount exceeding one thousand dollars, out of the usual course of its business. As the secretary was examined as a witness in the cause, it was incumbent upon the defendants, if they wished to rebut this prima facie evidence of authority to make the assignment, to inquire into the fact; and not to surprise the other party with an objection of this kind after the proofs in the cause had been closed. The vice chancellor is under a mistake in supposing that the assignment was executed by the secretary, as well as the president of the company. Upon its face, the assignment states that the corporation has caused its seal to be affixed, and the assignment to be signed, by the president of the company; and the execution of the instrument to be attested by the secretary. The latter, therefore, is not the officer of the company who executed the assignment, by affixing the seal to the same; nor does he, as the vice chancellor supposed in his opinion, swear before the commissioner that he affixed the seal to the assignment. He is merely an attesting witness to the deed, who proves its execution before the proper officer; to authorize it to be recorded, and to be given in evidence without further proof, under the provisions of the revised statutes on that subject. The fact that the corporate seal was properly affixed to an instrument which required an express authorization for that purpose, and where the mere circumstance that the person affixing it was intrusted with the custody of its seal was not even prima facie evidence of his right to affix it to the particular instrument in question, was a fact which it was necessary to establish before the officer who took the proof of the execution of such instrument, to authorize it to be recorded. For, without such proof, the mere evidence that the seal was affixed by an officer of the corporation intrusted with the custody of its seal, would not be

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sufficient to establish the due execution of this particular instrument. What the secretary of the company, who witnessed the execution of the instrument, testified to on the subject, before the commissioner, appears to have been proper evidence. And if the assignment was duly authenticated for the purpose of authorizing it to be recorded, I think it could properly be received in evidence without further proof; subject however to the right of the adverse party to show that it was not executed by the corporation, because no resolution of the directors had authorized the person intrusted with the corporate seal to affix it to such an assignment. The law is otherwise where a deed is executed by attorney. For the acknowledgment or proof of the execution of the deed by the attorney is all that is necessary to be established, by the recording acts, to entitle it to be recorded. The power of attorney under which the attorney acts is a separate and distinct instrument, which must not only be under the seal of his principal, but must itself be duly proved by the subscribing witness thereto, or acknowledged by the person executing the same, to entitle it to be recorded.

The remaining question to be considered is whether the corporation had the legal power to take a surrender of a part of its capital stock; not for the purpose of issuing new scrip therefor to other persons upon being paid or secured the amount of the same from them, but as an extinguishment of a part of the capital of the company, and to give up the property or effects of the company in exchange for the same. Upon a careful examination of the provisions of the revised statutes upon that subject, I think the vice chancellor arrived at the correct conclusion that the corporation had no such power. The assignment of the bond and mortgage, upon the surrender of the fifty shares of stock held by the complainants, as well as the endorsement of the \$2000 in consideration of the surrender of the other twenty shares of stock, for the security of the par value of which stock this bond and mortgage was also held by the company, was unauthorized. And being in direct violation of the statutory provision on that subject, the complainants acquired no legal or equitable right to the bond and mortgage by the

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assignment. The bond and mortgage therefore belong to the corporation as a part of the securities in which its capital stock is invested ; and may be enforced against the mortgaged premises for the whole \$7,000 for which they were originally given, with interest thereon from the time to which interest had been paid previous to the assignment. And the corporation having no power to purchase its capital stock, or to take a surrender thereof for such a purpose, the complainants, as the owners of the fifty shares of the stock illegally surrendered, must seek their remedy, if they have any, through the medium of such stock, and by having the concerns of the company closed by the appointment of a receiver. The revised statutes declare that it shall not be lawful for the directors of any mortgaged corporation to divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation, without the consent of the legislature. (1 R. S. 589, § 1, sub. 2.) The endorsement of the \$2000 on this bond and mortgage, upon the surrender of the twenty shares of stock owned by Bush, and the assignment of the residue of the debt to the complainants upon the surrender of the fifty shares of stock held by them, were both in direct violation of this plain and explicit prohibition of the statute. The complainants not only had notice of this violation of the statute by the officers of the corporation, but were themselves participators in the illegal act. And it would be inconsistent with every principle of justice for this court to aid them in the enforcement, not of a right acquired by a violation of the law, but of a claim of right which the legislature clearly intended they never should acquire in this way.

If there are any creditors, or any stockholders, who have not participated in this violation of the laws of the state which were binding on the corporation, they may apply for the appointment of a receiver, to collect in the debts of the corporation and distribute its effects among the stockholders according to their several rights and interests. (2 R. S. 464, § 39.) And if there are none such to apply, the receiver may be appointed upon the application of the attorney general. So that this bond and

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mortgage need not be lost to those who are equitably entitled to the moneys due thereon ; even if the directors of the company should fail to collect the amount. But as no legal or equitable title to the bond and mortgage was acquired by the complainants, through this illegal transaction, which a court of justice will enforce upon their application, the decree of the vice chancellor was right. It must therefore be affirmed, with costs.

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## VANDER VOLGEN vs. YATES.

[Affirmed, 9 N. Y. 219.]

The owner of a lot of land, in April, 1790, in consideration of £100, granted, bargained, and sold the same unto Y., V., and six other persons named therein, and to their heirs and assigns forever ; to have and to hold the same to the grantees and their heirs and assigns forever, upon *trust*, for the benefit of D., V., and eleven other persons named in the indenture, members of St. George's Lodge of Freemasons, and all others who then were, or thereafter might become, members of such lodge, their survivors and successors forever, and for no other use, intent, or purpose whatsoever. All the parties of the second part named in this deed, except Y., and the whole of the thirteen persons specifically named therein as a part of the then members of the lodge, having died, and the lot having been taken by a rail-road company, for the use of their road, the damages were assessed, and the amount paid over to Y. as the surviving grantee in the deed. Upon a bill filed by the heirs of the grantor in the deed, against Y., to recover from him the moneys thus received, for the lot, from the rail-road company ; *Held* that it was not the intention of the parties to the deed to vest either the whole legal title, or the whole beneficial interest in the premises, in the thirteen persons therein specifically named, as members of the lodge, during the terms of their respective lives, for their benefit and the benefit of the survivor of them exclusively. But that it was the intention of the parties that it should operate as a conveyance of the legal title of the whole fee of the lot, not for the benefit of the thirteen individuals named, for life, with a resulting use to the grantor, but for the aggregate body of the members who then constituted, or who should thereafter constitute, the St. George's Lodge.

*Held also*, that the members of the lodge could not, as a lodge or society of freemasons, take the legal estate in the premises, as an executed use, under the statute of uses ; but that they could take a beneficial interest in the property, as a charitable use.

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*Held further*, that the statute of uses, instead of vesting the legal estate in the thirteen persons named in the deed, for life, with remainder to the grantor as a resulting use, vested the whole legal estate in Y., V. and the six other grantees, and in the survivor of them, as trustees; in trust for the use and benefit of those who were, or who might thereafter become, members of the lodge, as a charitable use; that the legal title was in Y., the surviving trustee, at the time the damages were paid over to him; and that the complainants were not entitled to such damages.

It was not the intention of the framers of the statute of uses to defeat and destroy the beneficial interest of the *cestui que use*; but only to change his mere equitable interest in the use of the property into a legal estate, in the property itself, of the same quality and duration.

Accordingly, where the beneficial use cannot take effect as a legal estate, in the *cestui que use*, it will take effect as a trust, in the same manner as if the statute had not been passed; where it can take effect as a trust, consistently with the rules of law.

THIS was an appeal from a decree of the vice chancellor of the fifth circuit, dismissing the bill of the complainants. The bill was filed against J. C. Yates, and subsequently revived against the defendant A. E. Yates, his executrix, to recover moneys received by the former for a lot of land taken by the Utica and Schenectady Rail-Road Company. There was no dispute as to the facts of the case; and the only question was as to the equitable rights of the complainants, to the fund in question, under the deed of Nicholas Vander Volgen to J. C. Yates and others hereafter mentioned. Previous to April, 1790, N. Vander Volgen, under whom the complainants claimed title to the reversion of the lot taken for the purposes of the rail-road, was the owner of such lot in fee. In 1790, and for a long time previous, there had been, and still is, a lodge or society of freemasons in Schenectady, called St. George's Lodge. On the 27th of April, 1790, by an indenture made between N. Vander Volgen of the first part, and Joseph C. Yates, Lawrence Vrooman and six other persons named therein, of the second part, the party of the first part, in consideration of £100, paid to him by them, granted, bargained and sold, aliened, released and confirmed to the parties of the second part, (in their actual possession then being by virtue of a lease of bargain and sale for one year) and to their heirs and assigns forever, the lot after

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wards taken for the purposes of the rail-road ; with the hereditaments and appurtenances, reversion and remainders, rents, issues and profits thereof, and all the interest and title of the party of the first part in or to the premises ; to have and to hold the same to the parties of the second part and their heirs and assigns forever : upon *trust* nevertheless, to the only proper use, benefit and behoof of Cornelius Van Dyck, Lawrence Vrooman and eleven other persons named in the indenture, members of St. George's Lodge in the town of Schenectady, and all others who then were or thereafter might become members of such lodge, their survivors and successors forever, and to and for no other use, intent or purpose whatsoever. And Vander Volgen covenanted with the parties of the second part, their heirs and assigns, for further assurance for the uses and purposes then specified ; and also covenanted to warrant the premises to the parties of the second part and their heirs and assigns forever. All the parties of the second part named in this deed of bargain and sale and release, except Joseph C. Yates, were dead at the time the land was taken for the purposes of the rail-road. And the whole of the thirteen persons, specifically named in the conveyance as a part of the then members of the lodge, were also dead at the time the lot was so taken for the use of the rail-road.

The following opinion was delivered by the vice chancellor :

P. GRIDLEY, V. C. It is insisted by the complainants' counsel, that by force of this conveyance the whole legal and equitable estate of the grantor, (excepting a reversionary interest claimed by this bill,) passed into the grantees, and through them to and became vested in the cestuis que use who were named in the deed, and them only ; and that this was only an estate for the joint lives of the persons so named, there being in the conveyance no operative words of perpetuity applicable to the use. The conveyance in this case was by lease and release ; or rather by bargain and sale for one year, which by force of the statute of uses transferred the possession to the grantees so as to enable them to take the fee, by means of a release. (*See 2 Bl. Com.* 338, 339 ; *4 Kent's Com.* 494.) If the position of

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the complainants' counsel is correctly taken, that the legal as well as equitable estate passed instantly out of the grantees, and that the statute executed the use immediately in such of the cestuis que use only as were so named and described as to be able to take a legal estate, and that the other persons described as members and those to become members, &c. of St. George's Lodge took no interest, legal or equitable, it would doubtless follow that the reversionary interest in the premises would result to the grantor, or to those who represented him as to his real estate. The counsel has referred to many cases to show that neither the St. George's Lodge nor the members of it, nor their successors, are so described as to take a legal estate, and also that the grantor was capable of devising his reversionary interest. (4 *Com. Dig.* 355. 8 *John. Rep.* 301. *Co. Litt.* 3, a. 10 *Coke's Rep.* 266. *Shep. Touch.* 236, 237, 238, 417, 437. 4 *Cruise, Deed, ch.* 24, § 42. 4 *Kent's Com.* 25. 4 *Cowen*, 325. 9 *Ves.* 323. *Chitty's Dig.* 1288. 8 *John.* 422. 9 *Id.* 73. 6 *Conn.* 298. 4 *Wheat.* 1. 2 *Ves. & Beame*, 57, n. 6. 2 *Wash. C. C. Rep.* 441.)

It may be a question whether this conveyance, by lease and release, which together constitute but one conveyance, (4 *Kent*, 494,) should not be held to operate so as to vest the *legal estate* in the grantees named in the conveyance, upon the ground that being deemed for this purpose a deed of bargain and sale, the statute executes a use in the bargainees, the grantees, and therefore cannot execute a second use in the cestuis que use named; but will effectuate the intent of the parties by giving a trust estate to the cestuis que use. That such is the rule when applied to a conveyance which is an original deed of bargain and sale, is an elementary doctrine. (2 *Bl. Com.* 335, 6, 7, and the cases there cited.) The supreme court of this state, in *Jackson v. Cary*, (16 *John* 302, 304,) have applied this doctrine to a conveyance by lease and release; regarding it substantially a bargain and sale. And they held that the deeds of lease and release in that case were a bargain and sale. Ch. J. Spencer, in delivering the opinion of the court says: "The first objection to the deed from the Kips is that it is a deed of bargain and

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sale, and that upon such a deed a use cannot be limited to any other person than the bargainee." He then quotes Saunders for the principle that no use can be limited to arise out of the estate of the bargainee to a *third person*; for that would be to limit a use to arise upon a use. Therefore he adds, "if A. bargains and sells to C. to the use of A. (the bargainor) or to any *third person* for life or in fee, this limitation to the use is void," though he insists it would be good in equity as a trust. Now if this doctrine, which is undoubted law as applied to a bargain and sale, is applicable to the conveyance by bargain and sale and release conjoined, according to this decision, then there is an end of this case, for the legal estate vested in the grantees, one of whom, the original defendant in this suit, was living when the bill was filed. I might, perhaps, repose myself upon this case alone, but I prefer not to do so, inasmuch as the authorities cited in the note appended to the case, and some others, seem to regard a lease and release as standing on different grounds from a mere bargain and sale, and to require the limitation of an use in such case to the grantees, &c. necessary to make the second use void as being limited on a previous use. (2 *Bl. Com.* 336, n. 11. 6 *Barn. & Cress.* 305. 3 *Coke Lit.* 271, b, n. 231. *Dyer*, 155. *Cro. Car.* 224. 2 *P. Wms.* 146.)

There are however grounds, independently of this, which convince me that the complainants have no equitable right to the relief sought. The claim of the complainants rests on establishing the proposition that the grantor, by the conveyance, parted with nothing but a life estate, to endure no longer than the life of the last survivor of the cestuis que use named in the deed, and that on his death the residue of the estate reverted to those who were entitled to this portion of his real estate. The reasoning by which this position is maintained is this, that the statute executed the use declared in the deed; that none but the persons named are so described as to be able to take a legal estate, and therefore the whole estate conveyed vested in the persons named; and that that was only a life estate, inasmuch as no apt words are used to designate persons to receive the inheritance. The claim is not that the grantor did not use



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apt words to convey the whole estate ; not that he did not receive a full consideration for the whole estate ; not that it was not the intent of all the contracting parties that the whole estate should be conveyed by the grantor, and that it should be enjoyed in perpetuity by the members of St. George's Lodge, but that the parties who were intended to take the beneficial use were so defectively and inartificially described, that by an inflexible rule of construction a life estate only was created. Let us examine, and see whether such is the inevitable result of the phraseology of the deed. This deed is a contract in which the grantor, the grantees, and those for whose use the property therein described was purchased, are interested ; and it is necessary therefore to see what rules of interpretation are to be applied to this instrument. The cardinal rule of construction is that the intention of the parties, as ascertained from the whole of the instrument, is to prevail. (3 *Cruise*, 415, *Deed*, ch. 23, §§ 1, 6.) That stress should not be laid on the strict meaning of words when the intent is clear. (*Id.* § 4.) That the construction ought to be on the entire deed, and not merely upon a particular part of it ; that the construction should be most strongly against the grantor. If a deed will bear two constructions, the one favorable to law and justice and the other against it, the former shall be preferred. (*Id.* §§ 6, 7.) Words are sometimes rejected and omissions supplied to effectuate the intent of the parties. (*Id.* §§ 11, 13, 15.) If a deed cannot operate in the manner intended, it shall be sustained to operate in another. By this rule a conveyance void as a lease shall be construed a grant. (*Id.* §§ 17, 18, 19, 20, 21.) In *Roe v. Tanner*, (2 *Wilson*, 77,) Lord Mansfield says the rules laid down for the construction of deeds are founded in law, reason, and common sense ; that they shall operate according to the intention of the parties, if by law they may, and if they cannot operate in one form they shall operate in that by which the law will effectuate the intention. An objection is made in this case, which, it is said, takes it out of the general rule and the doctrine of the authorities cited ; and that is, that in the release in question the word *grant* is not used. But that the intention

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of the parties was to pass all the right and title of the plaintiff in the premises, is manifest beyond a doubt. Aston, justice agreed with Lord Mansfield, though this doctrine was said to be opposed to some old authorities cited by Cruise. See also the whole of the opinion of Willes, C. J. in that case, which goes a great length for the doctrine of bending the rigid rules of verbal constructions to carry into effect what is seen to be the manifest intent of the parties. So too in *Petersdorff's Abridgment*, (vol. 7, p. 687,) there is a strong case to show how far courts have gone to give efficacy to the intent of the parties. (*Id.* 68, 69.) And when a deed may enure different ways, the grantee shall select which way to take it, and the construction shall be in favor of the party upon whom the benefit is to be conferred. (*Id.* 690.)

Now the construction contended for by the complainants will defeat the intention of the parties to this deed, and not only so, but will be in direct and irreconcilable hostility to its most solemn provisions and covenants. It, on its face, conveys the premises in question to the grantees and their assigns forever, together with the reversion and reversions, remainder and remainders, and also all the right, title, interest, &c. of the grantor in the same. To have and to hold the same to the grantees and their heirs forever. Now on the face of this it is contended that the reversion was not conveyed by the deed. The conveyance is upon trust to the only proper use, benefit and behoof of Cornelius Van Dyck, &c. and all others who at present are, or hereafter may become, members of St. George's Lodge in Schenectady, their survivors and successors forever. It was foreseen by the parties that the conveyance might be defective and not fully convey all the estate and interest intended, and therefore the grantor covenanted for himself, his heirs and assigns, to execute such further conveyances as might be necessary to effectuate the intent of the parties in relation to the uses and purpose before declared in the said deed. Now if, under the above rules of construction as applied to the different portions of this deed, there are found sufficient words of description and adequate parties to take the whole estate of the gran-

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tor, then the whole estate should be held to have passed, and wherever else it may be, it is out of the grantor, and in that event the bill should be dismissed. Suppose that the clause in the deed providing for this trust expressed only the persons named, or one of the persons named therein, without any words of perpetuity; where then would be the legal estate? A life estate would be in the *cestuis que use*, executed by the statute. But where would be the residue of the estate—the reversion? Would it be in the grantor as a resulting use? Why should it result? Because the whole estate was not granted? No. Because there was no consideration paid by the grantee? No. Because there was no person to take? No. For the grant was to the grantees and their heirs, and for a full consideration paid by them. There is then no *necessity*, according to any rules applicable to cases of resulting uses, that the estate should revert, in opposition to the expressed intent of the parties. It is not like a grant to A. and his heirs for the use of A.; but it is a purchase, by the grantees, of the whole estate for adequate consideration, with a provision in the deed reserving a life estate to a third person, and belonging in law and equity to the grantees and their heirs after the termination of the life estate. Such seem to me to be the legal rights of the parties in the case supposed. And such is this case in law, if the complainant is right in excluding the other members and future members of the lodge from all legal and equitable interest in and to the premises conveyed by the deed. (*See Cornish on Uses*, 80, § 5.)

Again; if we suppose, with the complainant's counsel, that the whole estate that was conveyed passed through the grantees and vested in the *cestuis que use* who were named, does it follow that they took the estate as absolute owners, discharged of any trust? Why should they not be deemed to take the estate in trust for themselves and the other and future members of the lodge? Such was the obvious intent of the grant, and in that event the trust would not fail by the death of the trustee. Chancery would appoint a trustee to uphold the trust for the benefit of the *cestuis que use*. In *Jackson v. Cary*, (16 John. 302,) and in the cases there cited, and in numerous others, it is

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seen that though a second use is void as a use, it will yet be upheld as a trust, to effectuate the intent of the parties. Here a use was declared for A. and B., and also for a class of persons described as members of a lodge. Now A. and B. take the legal estate, because the members of a lodge cannot take it. But they may be the objects of a beneficial trust. Why then should not the court, in analogy to the principle just referred to, carry out the intent of the parties by allowing A. & B. to take the legal estate in trust for themselves and the members of the lodge? But in my judgment the rights of the persons described as members and future members of St. George's Lodge may claim the protection of the court upon more independent grounds. I am of opinion that the provision in favor of the persons named as cestuis que use and the members of St. George's Lodge raised a trust for the whole and not a use for a part. It is laid down that the question whether parties shall take a trust estate, or a use executed by the statute, will depend on intention. (4 *Taunt.* 774. 3 *Co. Litt.* 290, n. 6.) And in ascertaining the intention, courts have looked to what was contemplated to be done with the premises conveyed, and if any duty was to be performed by the grantee, such as to dispose of the rents, &c. or of the lands, &c. in such a manner as to require the legal estate to reside in the trustee, it would be held a trust. Now apply that rule to the facts of this case. The intent was to give this land to the use of the members of the lodge, in perpetuity. That could not be done by conveying the legal estate unincumbered with the trust; for if there should be no trust the legal estate would vest in the grantees or cestuis que use absolutely. And a conveyance to the members, as such, would be void for uncertainty; and if to the St. George's Lodge, it would be void because there was no such corporation known to the law; and in either case, the whole intent of the purchase would be defeated. These are certainly cogent reasons why this provision should be declared a trust. Again: Here are not only the members named, but members living and not named, and others, to succeed the present ones. All equally interested and intended to enjoy the benefits of the

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purchase. Now shall this statute be declared to execute the use in a part of the persons to be benefited, when by regarding the provision as creating a trust instead of a use, the whole would be benefited, in accordance with the clear intention of all the parties? Again: Shall the provision be declared a declaration of a use, instead of a trust, when such a construction will have the effect to divest the purchasers of an estate of inheritance, for which they have paid a full consideration, and which the grantor conveyed in terms? In fine: Shall not this provision be declared to raise a trust instead of an use, when such a construction will carry into effect the general intention of the parties to the deed, and a contrary interpretation will defeat the whole object of the purchase? I cannot avoid the conclusion that a court of equity should hold this a trust, and not an use, although if the provisions had been expressed to be in favor of the persons named and them only, the law might have required me to say that the use was executed, by the statute, in the grantees named as cestuis que use.

There is another consideration of much weight. The covenant for further assurance provides for a possible defect in the conveyance, and the grantor and those who represent him may be compelled to perform it specifically. (*Platt on Covenants*, 340, § 5. *Id.* 353.) It is then the equitable duty of the grantor, and the complainants who represent him here, to make all such further conveyances, on request, as will fully assure the whole estate, in accordance with the original and manifest intent of the parties. The parties interested might say to the grantor, "You were paid the full consideration for the premises in question. You, in terms, professed to convey the whole estate, reversion and all, to the grantees and their heirs, for certain uses. It is true, the conveyance was defective, and by reason of such defects, it appears that only a life estate, instead of an estate of inheritance, was vested in the persons to whom the law gave the estate. We have built upon the land and added to its value, and we fear our title may fail by reason of defects in the deed. We now ask you to make the further assurance to effectuate the original intent." What could the

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grantor answer? I apprehend he could not give a denial which would receive the sanction of either a court of equity or his own conscience. I am of opinion, therefore, that there are equitable rights to this property in the defendant, or others standing behind him, which should bar the relief claimed by the complainants. I refer now to the case of *Jackson v. Brooks*, (8 *Wend.* 427,) where a deed very similar in its provisions was held to convey the legal estate to the grantee, in trust for the trustees and other inhabitants and freeholders of the town of Schenectady. The word *use* in the deed now under consideration has no artificial technical meaning, to distinguish it from the deed mentioned in the case of *Jackson v. Brooks*; for the statute executes trusts, as well as uses. I have examined the statute, and many cases under it which disallow all distinctions of this kind. Though *Jackson v. Brooks* is not exactly in point, it is nevertheless a strong case against the narrow rule of construction contended for by the complainants, and in favor of a liberal construction of the phraseology of conveyances, to effectuate the intention of the parties.

On the whole, if any of the views which I have taken of this case are sustainable, then the complainants must fail. It is not necessary in this suit to decide with certainty who is the legal and who the equitable owner of this property. It is only necessary to be satisfied that the complainants have no right to it, to dispose of the suit. That being my opinion, for the reasons I have given, I have not examined the other questions in the case.

*Wm. Tracy*, for the appellants. The conveyance by bargain and sale for one year, and a release to the bargainee to an expressed use, to a third person, was a proper and authorized manner of raising an use. (4 *Cruise's Dig. tit.* 32, *Deed, ch.* 12, § 43. 4 *Black. Com. App. Har. & Butler's Co. Lit. note* 231, p. 271. *Bridg. Conv.* 110. *Cruise on Uses, p.* 66, §§ 94, 95. *Id. p.* 167. *Sugden's Gilb. on Uses, Lond. ed.* 1811, 229, *note.* *Shortridge v. Lamplugh*, 7 *Mod.* 76; *S. C. Ld. Raym.* 802. 2 *Salk.* 678, *pl.* 5. 2 *Saund. on Uses, pp.* 64 to 68.)

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The only semblance of an authority opposed to the doctrine is found in the case of *Jackson, ex dem. White, v. Cary*, (16 John. 302,) quoted by the vice chancellor in his opinion. It is not entirely clear from the report whether the deed mentioned was not a simple bargain and sale of the reversion, after the term conveyed by the bargain and sale of the previous day. It is probable that it was. If it were not, it is very clear that the court fell into the error of confounding the then ordinary method (in 1790,) of conveying by bargain and sale for one year, and then a release of the reversion, with the simple conveyance by bargain and sale. The principle was a familiar one that on a bargain and sale no use to third persons could be limited, for the very obvious reason that the only estate the bargainee took, was the simple use, by virtue of his bargain, to which the statute transferred the possession. Before the statute, the bargainor still retained the seisin, and the bargainee the use; and as there could not be an use limited upon an use, then the bargain and sale could not be made to the bargainee to the use of a third person. And the statute did not alter this rule. The second use was void before and since, and the statute merely transferred the possession to the first use. Now to apply the law to our case. The bargain and sale for one year gave to the bargainees a lease for one year. That is, it gave them an use for one year, which the statute, by transferring the possession to the use, converted into an estate absolute for one year. They then held it absolutely, and as if they had it by a lease with livery of seisin. Then the release was given to them so seised for one year, to certain uses. This was a conveyance upon which the statute operated, and the possession of the reversion released was transferred to the use; the releasees taking to the use of the *cestuis que use* only. Not taking an estate for *themselves*, but simply taking the estate which was expressed by the use; so that it instantly passed through them to the *cestuis que use*.

The release to Robert Alexander and others, in the pleadings mentioned, simply conveyed through the releasees, *an use* which the statute executed into a legal estate to Cornelius

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Van Dyck, and the other *cestuis que use*, named with sufficient certainty. This use was for their joint lives and the life of the survivor; and therefore the estate they thus took was an estate for their joint lives and the life of the survivor. The release was an ordinary conveyance to uses expressed, which since the statute of uses, has conveyed no interest or estate in the land to the releasees, as the statute instantly passed the seisin over from the releasees to the use expressed, and to the resulting use of such part of the estate as was not declared. (*Hargrave & Butler's Co. Lit. fol. 271, b. note 231. 1 Saunders on Uses, 119.*) Not being a corporation they could not have *successors*, nor could they take real estate as a community or society. (*Cooper v. Corey, 8 John. Rep. 301.*) It is a settled rule that a community not incorporated cannot purchase or take in succession. (*Jackson v. Hartwell, Id. 424. Co. Lit. 8, a. Com. Dig. Capacity, b. 1. Touchstone, 237. Hardenburgh v. Schoonmaker, 2 John. 230. Hornbeck v. Westbrook, 9 Id. 73. Green v. Dennis, 8 Conn. Rep. 292. Baptist Association v. Hart, 4 Wheat. 1.*) The *cestuis* specially named, and they alone were able to take the use expressed. Those persons, if any, who were described as "all others who then were, or thereafter might become members of St. George's Lodge," &c. were not capable by that description, and could take nothing by the release for the uncertainty. This is shown by the cases last referred to, and the following: *Touchstone, 236, 509. Gilb. on Uses, 80. Cruise on Uses, 81 to 87. 1 Mod. Ch. 445.* The doctrine runs through all the learning upon conveyances taking effect by the operation of the statute of uses; that since that statute, an use is subject to all the rules which before the statute were applicable to the conveyance of real estate; for the reason that the statute operates instantly upon the creation of the use, to carry the possession to the cestui, or as it is expressed, to execute the possession to the use, and thus to give him the seisin of the estate. So that the same requisites became necessary in the cestui that were before the statute necessary in the grantee; and the same limitations and words of art to carry the use that were, requisite before the statute, in



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conveyances at common law to carry a similar estate. There being some cestuis named who were capable to take by the description in the release, and others who were incapable for want of being described with certainty, as the "other members of St. George's Lodge," &c. those who were capable, or in other words, described with certainty, took the whole use which was expressed in the release, and the statute instantly executed in them a legal estate of the same extent as the use expressed. (*Touch.* 82, 237. *Viner's Abr. Grants*, p. 133, pl. 6. *Samme's case*, 13 *Coke*, 54. 1 *Saund. on Uses*, 135. 4 *Cruise's Dig. Deed*, ch. 20, § 8.) The use raised was only an use for the lives of the cestuis who took under the release, and the life of the survivor. There were no terms employed to pass the inheritance to the *cestuis que use*. (1 *Saund. on Uses*, 122, 123.) In the release in question, in expressing the use, there were no words of limitation which will pass the fee. The word *heirs* could alone do that; and the word successors, which it contains, does not supply the want of that word, for the cestuis named not being a corporation, could have no successors. (4 *Kent's Com.* 25. 4 *Cowen*, 328. 1 *Hil. Abr.* 37, § 3. 2 *Id.* p. 3, § 2. 1 *Inst. ch.* 1, § 1. *Vin. Abr. tit. Estate*, p. 235, pl. 9. 4 *Cruise's Dig. Deed*, ch. 19, §§ 62 to 65. *Id. ch.* 21, §§ 2, 3, 4.)

The use to the cestuis que use being for life only, the remainder of the use (i. e. the inheritance) resulted at once to the releasor, and by operation of the statute vested in him the reversion in fee, after the cestuis' life estate. (1 *Cruise's Dig. tit. 9 Use*, ch. 4, §§ 19, 20, 21 to 26, 32, 35. *Id. tit. 12, Trust*, ch. 1, § 54, 56. *Shortridge v. Lamplugh*, 7 *Mod.* 76. *Lord Raym.* 798. *Lamplugh v. Shotterill*, 3 *Salk.* 387. 1 *Saund on Uses*, 104. *Viner's Abr. Use*, 236. 4 *Com. Dig. tit. Franchises*, F. 6, and note. *Cro. Eliz.* 35. *Touch.* 509.) It is said by Cruise, (1 *Cruise's Dig. tit. 9, Use*, ch. 4, § 32,) that if any particular use is declared in a lease and release, the residue of the use will result back to the releasor. This is the present case. Here the releasor, Claus Vander Volgen, when he makes the release, is seised of the inheritance, after the ex

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piration of the term which he conveyed away by bargain and sale for one year. This was a reversion of the estate for one year. He releases to the releasees in trust to the only proper use, &c. of Cornelius Van Dyck, and the others named, and all others who now are, or hereafter may become, members, &c. "and to and for no other use, intent, and purpose whatsoever." Now this was a particular use which, as has been shown, was an use for life only, and the residue of the whole use is the reversion upon that life estate, that is, the inheritance, after that use or estate is carved out; which, by the doctrine above stated, resulted back to the releasor. The consideration expressed in the release is the measure of the value of the use granted, and the courts must so infer. (1 *Saund. on Uses*, 104.) That is, the courts may not say the consideration seems too large to suppose any use less than the whole estate was meant to be limited; for it was matter of contract between the releasor and the cestui que use, and they agreed upon a consideration for the use expressed in the deed. If the use in a deed is limited by its terms to an use for years or for life, and a consideration is expressed in the deed, that consideration was the measure of the value of that use, in the opinion of the parties. And, indeed, in our release there is nothing in the case, in or out of the deed, to show that the consideration expressed was intended as a price for the whole of the releasor's estate. If it were, why did the releasor expressly, in his release, limit the conveyance to the releasees "to and for no other use, intent, and purpose whatsoever" than to uphold the particular use expressed to the cestuis que use?

The resulting use was, by the operation of the statute, immediately upon its creation, an estate of inheritance in the releasor, and was a proper subject of grant or devise. Nothing but an estate for the lives of the cestuis who were particularly named had been conveyed. The resulting use was of all the rest, and of course of the inheritance. It was a reversion of all that remained over a life estate, and by operation of the statute was a legal estate of that extent. The releasees took no estate whatever by the release; as by the operation of the statute they

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are made the mere conduits of the title to the *cestuis que use*. (1 *Saund. on Uses*, 119. 2 *Cruise's Dig. tit. 17, Reversion*, § 2. *Id.* § 11.) It was a proper subject of devise. (*Touch.* 238, 417, 437. 6 *Cruise's Dig. tit. 38, Devise, ch. 3, § 1.*)

The complainants, by virtue of the several wills of Claus Vander Volgen and Petrus Vander Volgen, are representatives of Claus Vander Volgen, and are owners of the reversion of the premises, after the life estate of the *cestuis que use*. On the death of the last *cestui que use* named in the release the estate reverted, and became the sole property of the complainants; and they alone owned it at the time the rail-road company appropriated it. If the views of the law given above are correct, this will follow, that J. C. Yates received the money as trustee for the actual owners, and the complainants are entitled to receive it from his representative, the present defendant. This, as I suppose, makes out our case. I now proceed to examine the objections urged by the vice chancellor in his opinion, upon deciding the cause when heard before him.

The vice chancellor erred in the position that it might be questionable whether an use to a third person could be upheld upon a release given on a bargain and sale for one year. This point is disposed of by the authorities referred to and quoted under the first point of this argument. He also erred in his supposition of the manner and nature of the complainant's claim, as stated in his opinion. Instead of his suppositions, we claim that the releasor did not use apt words to pass an use of the whole estate to the *cestuis*; that he used no words to pass to the *cestuis* more than a life estate; and that thus conveying a use to them for lives, all the remainder of the use, to wit, the inheritance, resulted back to the releasor, and by virtue of the statute, was executed in him a legal estate of that extent; that the releasor did not receive a consideration for the whole estate, but only for the use declared. (*See 1 Saund. on Uses*, 104.) That it was not the intent of the parties to the release that the whole estate should pass out of Nicholas Vander Volgen; but that it was simply to pass so much as was measured by the use expressed; and to pass that, not to the releasees, but to the *ces-*

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tuis que use, and so that they should hold it as a legal estate. That it was not the intent of the parties that the estate should be enjoyed in perpetuity by the members of St. George's Lodge; and that if it were, then by the terms and legal effect of the indenture, this intent cannot take effect, and the case would be the common one of a conveyance upon a particular trust only, which, by accident or otherwise, cannot take effect; in which case the trusts result to the original owner. (1 *Cruise's Dig. tit. 12 Trust, ch. 1, § 56.*)

The vice chancellor erred in his construction of the various rules laid down by Cruise, and their application to the case in hand. He says, "the cardinal rule of interpretation is that the intention of the parties, as ascertained from the whole of the instrument, is to prevail." The passage in Cruise is as follows: "The construction ought to be made on the entire deed, and not merely on any particular part of it. *Ex antecedentibus et consequentibus fit optima interpretatio.* Therefore, every part of a deed ought, if possible, to take effect, and every word to operate." (3 *Cruise's Dig. tit. 32 Deed, ch. 19, § 6.*) This rule is intended to apply in cases such as that of *Roe v. Tanner*, (2 *Wilson*, 77,) *Jackson v. Blodget*, (16 *John*. 172,) and various other similar cases; where the question is to determine from the language of the deed, first, what did the grantor mean to convey; and secondly, did he then use apt words to do it, according to the rules of the law. It was never intended that the court should merely guess what the grantor may have intended, and then twist the absolute force of the words he employed, against the rules of law, to effectuate such supposed intention. Cruise says, every part of a deed ought, if possible, to take effect, &c. He does not say that a part of a deed, which by the rules of law has no meaning, shall be made to supply the place of terms which alone of all language can create a fee simple. Indeed, in the same chapter, section two, he says, the maxim is that all deeds shall be construed favorably and as near the apparent intention of the parties as possible, consistent with the rules of law. If, however, the intention of the parties be contrary to the rules of law, it will

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then be otherwise; for it would be highly improper and inconvenient to permit private persons to contradict the general rules of law. Thus, if a person conveys land to another, and his heirs, for twenty-one years, the executor of the grantee, and not his heir, will be entitled to the land; because it is a rule of law that a term for years is but a chattel real, which goes to the executor. (*Id.* § 3.) It will be observed from the illustration given in this section, that Cruise does not mean by an "intention contrary to the rules of law" an illegal intention in the grantor, but simply that when in a deed it appears to have been the intention of the grantor to convey land to particular persons, and he uses terms or a manner of doing it, which is not according to the rules of law, the deed shall not be construed according to this apparent intention, but shall take effect according to the rules of law; and this notwithstanding that intention was entirely proper, and might have been carried into effect by the use of apt words. For it would have been perfectly easy for him, and entirely consistent with the rules of law, to have conveyed to the grantee an estate for twenty-one years in case he should live so long, and to cease upon his death, with remainder in case of his death previous to the expiration of such twenty-one years to his heirs for the unexpired portion of such twenty-one years. And then his apparent intention would have been the same as in the case in the text, and the intention would not have been contrary to the rules of law. The vice chancellor says, that "stress should not be laid on the strict meaning of words when the intent is clear." The passage in Cruise is that, "where the intention is clear, too minute a stress ought not to be laid on the strict and precise meaning of words." This is applicable in such cases as those where a deed is intended and made to pass property in one way. It may, that way being impracticable, be made to pass by some other that is conformable to the rules of law. The case of a deed intended for a release, taking effect as a grant; as a release of a rent charge, or a corporeal hereditament. (*See Touchstone*, 82.) Again, the vice chancellor says: "If a deed will bear two constructions, the one favorable to law and jus

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tice, and the other against, the former shall be preferred." The passage in Cruise is, "If the words of a deed will bear two different senses, the one conformable to law and the other against it; that sense shall be preferred which is conformable to law," &c. (3 *Cruise's Dig. tit. 32 Deed, ch. 19, § 18.*) The doctrine is just this. If the deed, on its face, bears an interpretation perfectly consistent with the rules of law, and may also indicate that the grantor had some intention which could not, according to the rules of law, be carried into effect by the terms he employed, the law will carry into effect the interpretation which is consistent with the rules of law. Let us apply the doctrine upon the vice chancellor's supposition of the case in hand. On the face of the deed he supposes there is an apparent intention to convey to the cestuis an estate in fee simple. Now by his deed he has used terms which by the rules of law convey to them a life estate, and no more. The words of the deed, then, bear one sense conformable to law, which is to pass only a life estate to the cestuis que use. But the vice chancellor supposes the intention was to pass all of the grantor's estate out of him. Now, the words of the deed, if this is the supposition, will bear a sense to create an estate in fee simple, without the use of the very terms which by the rules of law can alone create a fee simple, to wit, the term heirs. That is, they will bear a sense not conformable to law; and in this case our author says the sense shall be preferred which is conformable to law. The vice chancellor observes that words are sometimes rejected, and omissions supplied, to effectuate the intent of the parties. The passage in Cruise is, "where there are any words in a deed that evidently appear repugnant to the other parts of it, and to the general intention of the parties, they will be rejected as insensible," &c. (3 *Cruise, tit. 32, ch. 19, § 25.*) By no means that words are rejected or supplied to effectuate what the court might guess was the general intention of the grantor. As to the omissions being supplied, an evident omission or mistake will be supplied in a deed. Thus, where the name of the bargainor was omitted in the operative part of a bargain and sale, it was supplied. (*Id. § 29.*) But no one ever heard

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that the word heirs, the efficient, and only efficient term of limitation, was ever thought to have been omitted by mistake, and supplied. The vice chancellor again says, "If a deed cannot operate in the manner intended, it shall be sustained to operate in another," &c. The passage in Cruise is, "Where a deed cannot operate in the way intended by the parties, it will be construed in such a manner, as to operate, if possible, in some other way. *Quando quod ago non valet ut ago, valeat quantum valere potest,*" &c. (*Id.* § 33.) And in the succeeding sections cases are given illustrating the rule. The rule is not that when a deed will not by the rules of law carry into effect the apparent intention, the court will so construe it as to make it carry such intention into effect in some other way, by overriding the rules of law. But it is that where the apparent and obvious intention cannot be carried into effect in the precise manner the parties intended, nevertheless, if the terms of the deed permit the intention to be carried into effect, consistently with the rules of law, in some other manner, the court will construe the deed in that manner. As in the case of a lease and release which could not operate as such, but which contained a grant and assignment, by which the estate intended to be released could pass, the court held it to pass the estate as a grant and assignment.

Again; the vice chancellor erred in his application of the case of *Roe v. Tanner*, and Lord Mansfield's remarks in that case. The case of *Roe v. Tanner*, (2 *Wilson*, 77,) does not sanction any bending of the rigid rules of verbal construction, to carry into effect what is seen to be the manifest intent of the parties. There was no bending of any rule in that case. To give the legal effect to the language employed was all the court did. I. Kirby had made a lease to Christopher Kirby for one year, and then released as follows: "Doth grant, release and confirm unto Christopher Kirby after the death of the said Thomas Kirby, &c. with remainder to Wilkinson [the lessor of the plaintiff] in fee tail;" with a covenant that the lessee [Chr. Kirby] should have the use, &c. And there was a consideration of £100 expressed in the release. The question was merely

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whether the releasee could take the release and grant, it being of an estate tail to commence *in futuro*. It was clear that he could not take by a release or grant an estate of that description to commence on the determination of a contingency. And it was contended by the plaintiff's counsel that the release should be sustained as a covenant to stand seised to uses; because 1. There was a proper consideration, £100 actually paid; 2. A deed; 3. The covenantor, the releasor, was seised in fee; 4. There were apt words; and 5. There was a manifest and plain intent. Willes, C. J. said, "We are all of opinion it shall take effect as a covenant to stand seised." Secondly, here are apt words, viz. a covenant that the grantor has power to grant, and a covenant that all fines, recoveries, &c. of the lands shall enure to the uses in the deed. Fourthly, there appears a most plain intent that Wilkinson (the lessor) should have the lands in case Christopher Kirby died, in fee, and lastly consideration of blood. Lastly, he said the whole court were of opinion that a man could covenant to stand seised to use of another after the covenantor's death. He said the strongest cases for the defendant were in 1 *Sid.* 25, and 2 *Vent.* 318; that he did not understand them, and had he sat in judgment he should have been of a different opinion in both. Now here the case was a very plain one. It was manifest that the grantor wished to give an estate tail to commence *in futuro*. Why? Because he released and granted an estate in that form. But the releasee could not take by that form of conveyance such an estate. And the grantor foresaw that that might be held to be the law, and he therefore inserted a covenant to stand seised after his death to the use of the lessee and remainderman. The court simply held that this *last provision* was conformable to law, and therefore decided, that though the deed could not operate in the way intended by the parties, yet as it was possible for it to operate in another way, it so construed it; and regarded it as a covenant to stand seised, because it had all the requisites of one; instead of a release or grant. The case of *Cholmondeley v. Clinton*, (7 *Petersd. Abr.* 687,) also referred to by the vice-chancellor, affords no example of any bending of the rules of



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law to effectuate the intention of the grantor. The case of *Gregory v. Henderson*, (4 Taunt. 772, 774,) also referred to by the vice chancellor in support of his views, is simply a case turning on the distinction between an use executed by the statute and an executory trust. Neither of these cases appear in the slightest degree to support the vice chancellor's views. No rule of law was bent to carry out the supposed intention of the grantor. In the case of *Roe v. Tanner*, the deed, besides being a release and grant, was a covenant to stand seised. And the court merely held that that covenant should be carried into effect, while the other parts of the deed were inoperative. In *Cholmondeley v. Clinton*, no rule of law was bent, even by the two judicial officers who held that the deed should be construed to uphold the declared intention, as they took into view an element not considered by the others. And yet in that case three judges held that the declared intention could not be carried into effect. In *Gregory v. Henderson*, the courts merely decided upon the rule which, in all the cases, distinguishes between executory trusts and uses executed by the statute, to wit, if there is any thing for the trustees to do, the trust is executory, and the cestui does not take a legal estate. If otherwise, the statute executes the possession to the use.

The vice chancellor also erred in his general conclusion that the construction contended for by the complainants would defeat the intention of the parties to the deed, and be in hostility to its provisions and covenants. He errs in assuming that the intention of the parties to the release was to pass all the estate out of the releasor, and that that intention must be effectuated by the court. Now there is nothing in the release to indicate such an intention. It is worthy of remark that the instrument was one operating by the common law and statute of uses combined, and was such an one as was in common use in this state, at the time, to convey legal estates; and that it was the accustomed method of conveying legal estates up to within two years of its date. (4 Kent's Com. 494, ed. of 1832.) By such a deed it was well understood that the only estate which passed out of the releasor was the use expressed, which

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by virtue of the statute was executed in the cestuis, a *legal estate*, of the same extent, and that the releasees took nothing. (*See 1 Saunders, 119.*) There is then no evidence, on the face of the deed, of an intention to pass any greater estate out of the grantor than the uses expressed, and the releasor expressly declares and provides in the release, that the releasees shall hold the premises to and for no other use, intent and purpose whatsoever than the uses expressed. Again; the intention of a party to a deed is to be gathered by the court solely from the terms he employs. If he employs technical terms, he is supposed to know their force and meaning, even in the case of a will. (6 *Cruise's Dig. tit. 38 Devises, ch. 9, § 6.*) If he omits terms which are necessary to pass a fee, it is presumed that it was not his intention to pass a fee. If he conveys to two, one capable and the other incapable, it is presumed that it was his intention to give to the one capable. This is a familiar principle. (4 *Cruise's Dig. Title Deed, ch. 19, § 3. Co. Litt. 271, b, note 231, by Buller.*) The principle is common to both courts of law and courts of equity. The same rules of interpretation and construction apply, to conveyances of land, in both courts. A court of equity may correct mistakes in a deed, when properly applied to for the purpose; but in the construction of the terms and words of a deed, it is governed by the same rules as courts of law. It determines what is the legal effect of the instrument, and nothing more. (1 *Mad. Ch. Pr. 452, 552, 574.*) The vice chancellor erred in this position, that the release on its face conveyed the premises in question to the grantees and their heirs forever, together with the reversion, &c. and all the right, title, interest, &c. of the grantor in the same, to have and to hold to the grantees and their heirs forever. By a strange mistake, the vice chancellor overlooks the remainder of the sentence in the habendum. In the release it is as follows, "to have and to hold to the parties of the second part, their heirs and assigns forever, upon trust nevertheless to the only proper use, benefit, and behoof of Cornelius Van Dyck, and the others named, &c. and the future members, &c. and to and for no other use, intent and purpose

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whatsoever." Now such a deed in fact conveys no estate whatever to the releasees. It is on its face an artificial, technical instrument, drawn by a conveyancer who understood the nature and effect of the statute of uses, and who understood the manner of conveying by lease and release to uses through the aid of the statute; for he refers to the former deed of bargain and sale for one year, as giving possession by virtue of that statute. Now in the view of such a person the release conveys no estate to the releasees. So far as they are concerned, the release is precisely such an one as it would have been had the conveyancer been instructed to convey to Cornelius Van Dyck, alone, an estate for life, leaving the inheritance in the releasor untouched. The seisin of the persons seised to the use must have been sufficient to serve the use declared to the cestuis. This was always necessary, or the use might fail. So then, when the intention was to convey to the cestui a life estate, the practice was to convey in terms to the nominal grantee, the fee; then to declare the use to the cestui for life, and let the residue of the use, i. e. the inheritance, result by implication to the grantor. Then the statute executed the use for life to the cestui, and the remainder, that is the reversion, to the grantor. The effect was that the cestui got a legal estate for life, and the grantor retained the reversion; but the grantee took nothing. (See 1 *Saund. on Uses*, 119; *Co. Litt. fol. 271, n. 231 by Hargrave & Butler*.) Again. The vice chancellor lays stress upon the fact that the releasor released to the grantees the estate, together with the reversion and reversions, &c. But this was necessary to pass any estate to be executed in the cestuis. At the time of making the release, all the estate of the releasor was the reversion after the estate for one year which was in the releasees by virtue of the bargain and sale. He had nothing but this to release. And the release of that reversion to the releasees, upon the trust to uphold a certain use declared upon it, with the express declaration that the conveyance was not to the releasees for any other use or purpose whatsoever, could never be construed to be a conveyance to the releasees of all the residue of the estate after that use was completed. The

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plain import of the deed is, "I convey to you in trust that you may give a lease for life to the cestui que use, but for no other purpose, and I give you no more than just enough to convey such a life estate." There was no conveyance of any reversionary use. He also erred in his inference drawn from his observation that the conveyance was to Van Dyck and others, and those who were, &c. their survivors and successors forever. He places stress upon the word *forever*. Now this term was never held in a deed to create a fee simple. It is a most common doctrine that a deed to a man to hold to him forever only gives him a life estate. Nor does the word successors help the matter, or aid to create a fee simple, as I have already shown. Suppose the use had simply been to Cornelius Van Dyck and the other cestuis named forever, could they, on any principle, take more than a life estate? Now the effect of the deed is the same as if it had been so, for the words, members of St. George's Lodge, added to their names, were only words of description, and they could have no successors.

The vice chancellor also erred in the conclusions he draws from the cases put by him by way of illustration. He says: "Suppose the clause in the deed providing for the use expressed only the persons named, without any words of perpetuity, where would be the legal estate; the residue after the cestuis' life estate? Would it be in the grantor as a resulting use? Why should it result? Because the whole estate was not granted? No!" By the doctrine every where laid down in relation to conveyances operating by the statute of uses, the legal estate, the residue after the cestuis' life estate, would be in the grantor as a resulting use executed by the statute. And the reason why it should result would be that the use of only a life estate was ever disposed of. And I have shown that the releasees took nothing by the release. The releasees' estate for one year was merely enlarged to uphold the uses, and for no other purpose, and the use expressed exhausted the consideration in the release, as has been shown. The residue of the use, for all the reasons given under the third point, resulted to the releasor, and was, by operation of the statute, vested in him *eo*

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*instanti* as a legal estate. The vice chancellor continues—“Because there was no person to take? No! for the grant was to the grantees and their heirs forever, and for a full consideration!” The answer is an obvious one. The grant was to the grantees and their heirs, for the particular purpose of upholding the use; and it was expressly declared that it was to and for no other use, intent and purpose whatsoever. They took nothing at all by the release, and had no interest in the estate. (1 *Saund. on Uses*, 119.) As to the estate of the grantee. It is obvious that as the statute has made the estate of *cestuis que use* legal instead of equitable, and entirely divested feoffees, releasees, &c. of all estate whatever, most of the incidents which attended the use in its fiduciary state are now at an end. With respect to the feoffee, he has no interest at all in the land. It could never have been intended that the releasees should take any thing by the release. It was only meant that they should be the *conduit* through which to pass a legal estate to the *cestuis*; of the same nature and extent as the use declared.

The vice chancellor erred in the following conclusions from his train of reasoning: That there was no necessity, according to any rules applicable to cases of resulting uses, that the estate should revert, in opposition to the expressed intent of the parties; and that it was a purchase by the grantees of the whole estate for adequate consideration, with a provision in the deed reserving a life estate to a third person, and belonging, in law and equity, to the grantees and their heirs after the termination of the life estate. In the first place, there is no expressed intent of the parties that the use should not result. The only expressed intention in the release is that the releasees should take sufficient seisin to uphold the use to the *cestuis*, and that they should not take any estate in the premises for any other use, intent, and purpose whatsoever. In the second place, I have shown by the note on Coke Littleton, above referred to, that if there had been an intention to grant the *cestuis* an estate in fee, that cannot be made to ride over the legal effect of the terms employed, or supply the omission of terms absolutely necessary to pass a fee simple. The inflexible rule of interpreta-

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tion as to the estate granted, before shown, is followed as well by courts of equity as those of law. (*Bagshaw v. Spencer*, 2 *Atk.* 574. 1 *Mad. Ch. Pr.* 452, 558.) As to the vice chancellor's second conclusion, that by the force of the conveyance the releasees took the whole estate subject to the life estate to the cestuis, it is at war with the whole doctrine of uses created for less than the whole estate, and the doctrine of resulting uses. There is not a case in the books to uphold the notion, that a deed which conveys to grantees an estate in fee on trust to a certain use for life, and with the express provision that it is intended for no other use, intent, or purpose than such declared use, ever did, since the statute of uses, convey any estate to the grantees, or that the use of the inheritance did not result to the grantor. There is no analogy between such a deed and a deed containing a reservation or exception. As has been shown, since the statute, the grantees take nothing in the land. Mr. Saunders thinks they may possibly be entitled to the deed, as the statute only draws the legal estate to the use, and says nothing of the muniments of title. (1 *Saund. on Uses*, 119.) The vice chancellor's reference to *Cornish on Uses*, (p. 69,) does not sustain his position. The passage referred to is a full examination of the doctrine of resulting uses, and the broad principle of all the other writers is laid down as fundamental, that "so much of the use as the grantor does not dispose of remains in him."

The vice chancellor erred in the position that if the estate passed through the grantees and vested in the cestuis, they took it in trust for themselves and the future members of the lodge, and they dying, the chancellor will supply trustees. If the only estate which was carved out by the expressed use of the releasor, was an estate for life to the cestuis who were sufficiently named, then on their death the estate is ended, and the inheritance reverts to the representatives of the releasor. No instance is to be found in the history of conveyances operating either at common law or by the statute of uses, where, when an estate or use was conveyed to two persons, one capable and one incapable, the capable should be held to take in

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trust for himself and the non-capable. The rule in such cases as above stated is inflexible. The authorities there cited show this. (*Touchstone*, 82, 237. 1 *Saund. on Uses*, 135. *Cruise, Deed*, ch. 20, § 8. *Viner's Abr. Grants*, 133, pl. 6.) There is a class of cases where, since the statute, an use upon an use which cannot be upheld as such, is upheld as a chancery trust. As where A. bargains and sells to B. to the use of C. ; or where A. covenants to stand seised to the use of B. for the use of C. Now at common law, before the statute, the second use would have been void as an use upon an use. And so the courts still hold. For the only seisin which B. would have to uphold the use to C. would be the use given him executed by the statute. So they hold that the statute executes the use which was good at common law, and that the void use is still void. Nevertheless the court of chancery, by a practice which has been a good deal complained of, but which has become thoroughly established as law, have got round the difficulty by regarding the second use as an executory trust, and thus by subpoena compelling the first cestui whose estate had been rendered a legal one by the operation of the statute, to hold as a trustee for the second use. (See 2 *Black. Com.* 335, *Chitty's note* 60, and the cases there referred to.) This is the only case where a cestui que use is held to be a trustee. No case can be found where, in a grant to two grantees, one capable and one incapable, the capable takes in trust for himself and his incapable co-grantee. In the present case the release is to the use of twelve capable persons, and sundry others who might or might not be in existence—who were unknown to the law—and were incapable to take as they were described in the release. The capables therefore took all the use expressed. Again ; the use expressed was so expressed that no estate of inheritance passed. It was therefore an use for life only, as has been already shown. I have remarked that the release in this case was such an one as, at the time it was made, was in common use to convey legal estates. (4 *Kent's Com.* 494, ed. of 1832.) And it appears by the statute for the prevention of frauds, passed in 1787, (1 *Greenleaf's Laws of N. Y.* 385, § 3,) that the doctrine of

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resulting uses was recognized and preserved. That was but three years prior to the date of the release. It must therefore be presumed that the conveyancer drew the release for the purpose of transferring a legal estate. Most certainly the notion that there is any thing in this conveyance to take it out of the ordinary class of deeds operating by force of the common law combined with that of the statute of uses—well understood at the time the conveyance was made—and to render it the instrument of creating a new and anomalous trust is without a semblance of authority or analogy.

The vice chancellor erred in his construction of the rule that the question whether parties shall take a trust estate, or an use executed by the statute, will depend on intention, and in ascertaining the intention courts have looked to what was contemplated to be done, &c. ; and also in its application. The intention which courts look into the deed to ascertain, in order to determine whether an executory trust is created, or an use is executed by the statute, is confined to this point—What did the grantor contemplate was to be done by the grantee with the premises? It is the legal effect of the terms employed. If the instrument simply gives the estate to A. in trust for B., without any further provisions ; or to A., in confidence that he should hold it for B. ; in these and all such cases, where nothing is to be done with the premises by A. but to hold it for B., the statute executes the possession to the use, and creates the legal estate in B. If it convey to A. with directions to manage or dispose of the estate, or the rents, for the benefit of B. in such a manner as to require A. *to do any thing* in order to carry into effect the direction in the trust clause, there the statute does not operate, and the estate is in A., as a chancery or executory trust. And the reason is given by all the writers, that in this case it is necessary that the legal estate should remain in him, to enable him to perform his duty under the trust. The broad distinction is this : If there is any thing for the trustees to do, requiring them to have the power of controlling or exercising acts connected with the possession of the legal estate, then it is a chancery trust. If there is nothing for the trustee to do, it is an use



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executed by the statute. (1 *Mad. Ch. Pr.* 448 to 459. *Coke Lit.* 290, *Butler's note* 249, § 504.) It is sometimes doubtful whether an estate be legal or equitable. The result of the cases seems to be, 1st. That a devise to A. and his heirs in trust for B. and his heirs, without any ulterior words, is an use executed by the statute in B., and so also would be a devise to A. and his heirs in trust to permit B. and his heirs to receive the rents and profits. 2d. That a devise to A. and his heirs with directions to dispose of the estate, or of the rents, in such a manner as necessarily requires the legal estate should reside in him, will of course vest the legal estate in him. (*Id.* 2 *Bl. Com.* 335, *Chitty's note* 60. *Id.* 336, *Christian's note* 62. 21 *Wend.* 147.) By the release in this case there was nothing for the releasees to do. The intention was simply that they should be the conduit of an estate to the cestuis. The conveyance was expressly, and in terms, upon trust to the use of the cestuis, and to and for no other use, whatsoever. And it would have made no difference, in its effect, if it had, by any other form of words, expressed that the releasees should hold it for the cestuis named; so long as there was nothing for them to do as trustees. For the statute of uses executes the use in all such cases. Its language is, "Where any person or persons stand or be seised, &c. to the use, confidence or trust of any other person or persons," &c. And besides these particular words, use, confidence and trust, the word intent will raise an use to be executed; as a feoffment in fee, *ea conditione*, that a third person should have, &c. (1 *Saund. Uses*, 98.) And all such uses, confidences and trusts were executed by the statute, and becoming thus legal estates, the incidents necessary in the conveyance of legal estates are all necessary in the transmission of uses. (1 *Saund. Uses*, 122 *Touch.* 509. 2 *Hill. Abr.* 341, § 51. 1 *Id.* 196, § 9. 1 *Cruise, tit. 12 Trust, ch. 1*, § 86. *Broughton v. Langley*, 2 *Ld. Raym.* 877.)

In no case where there is a technical artificial conveyance of an estate, employing terms of art having a fixed, certain and well known legal effect, will the court speculate and guess out an intention adverse to or inconsistent with the legal effect of

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the deed. (1 *Mad. Ch. Pr.* 554.) As to the releasor's intention here: When he declares in his deed that he had by bargain and sale conveyed an estate for one year, and that by virtue of the operation of the statute of uses that had become converted into a legal estate for that term, and when he goes on and by the strictest technical language conveys another use to the cestuis, is it possible that all parties did not intend that the statute should operate upon that use and convert that also into a legal estate? There is nothing, as the vice chancellor supposes, to show the use was intended for St. George's Lodge. The words *members of St. George's Lodge* following the names of the cestuis named, were merely descriptive of their persons. It was never heard that a conveyance to A., B. and C., members of a particular church, or society or corporation, was a grant to the society, or corporation. A grant to fifty persons, naming each, with the words being all the members of a particular society named, would be a grant to them as individuals. There is nothing in our release to indicate that the use was for the benefit of the lodge in any event. The courts have no power to bend a conveyance from the obvious and well settled legal effect of the language employed. (1 *Cruise, tit. 12 Trust, ch. 2, § 2.* 1 *Mad. Ch. Pr.* 452. *Com. Dig. Uses*, 992.) It may indeed be, in some cases, a hardship that the churchwardens of Dale, the inhabitants of Otsego county, or the inhabitants of the town of Rochester cannot take by those names. But the law intended for the benefit of the greatest number is so; and it was never heard that a new sort of trusts should be framed to get around it. Nor can the court guess at an intention, other than such as the legal construction of the instrument warrants. The intention is the legal interpretation of the terms employed. (*Toth.* 153.)

The vice chancellor erred in the conclusion that the covenant for further assurance placed the complainants, as representatives of the releasor, under obligation to make conveyances of the fee simple to the releasees, or the cestuis, or to the lodge. The covenant in question is, in terms, to make new and further conveyances when necessary, for the further, better and more

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perfect granting, conveying and assuring of all and singular the said premises above mentioned, with the appurtenances, unto the said party of the second part, their heirs and assigns, to and for the uses and purposes hereinbefore specified and more particularly mentioned. The covenant of warranty has the same qualification. And the estate released was qualified in the same way. The covenants, then, were merely to make further conveyances to uphold the use, and to warrant the use, and nothing more. And the covenants, in no manner, determine what that estate was. They refer to the habendum, the use declared, exclusively; and without that, their extent cannot be ascertained. If the use was for years, the covenants are to make assurances to uphold and warrant such an estate. If for life, an estate for life. But they are not to make deeds to convey a fee when the use was of a less estate. Again, covenants in a deed do not enlarge an estate, nor in any manner affect its extent. (*Touchstone*, 106, 182, 197.) If, as the vice chancellor proposes, the *cestuis que use* should demand further conveyances under the covenant, the answer would be, no conveyances are now necessary to uphold the use expressed. You have enjoyed that, and it is now ended; we only covenanted to secure that to you. If the releasees should demand further conveyances, the reply is, the land was only conveyed to you in terms to the use expressed; you were the mere conduits of the title, and never had any interest in it. You have had all the title necessary to uphold the uses expressed. If either should, as the vice chancellor proposes, tell us, you had a full consideration paid you for the premises, and professed to convey the whole, the reply is, the only consideration paid was for the use expressed. This is the legal, and the only legal presumption. And it is a mistake to suppose the conveyance professed to convey the whole. It expressly limited the estate conveyed to the use expressed. The vice chancellor then refers to the case of *Jackson v. Brooks*, (8 *Wend.* 427,) where he says a deed very similar in its provisions was held to convey the legal estate of the grantor in trust for the trustees and other inhabitants and freeholders of the town of Schenectady. He

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is mistaken in the fact. In the case of *Jackson v. Brooks* there was no question raised as to the effect of the conveyances made with the trust clause. The questions there were, whether one to whom both parties traced their claim of title, had or had not disposed of it. And it may be remarked of the facts in that case, that upon the strictest rules of uses executed, and conveyances at common law, the decision of the court was sustainable, and for the various reasons explained in the former part of this argument. There are a number of cases in our own reports where patents and conveyances intended to secure lands to the inhabitants of towns or counties have been examined. Upon a careful examination of them none of them will be found to be in conflict with the doctrines contended for by us; nor to sustain the notion that courts will uphold as a chancery trust a declaration of uses, or a trust where the trustee was appointed to do nothing; or where he was not to convey the estate in fulfilment of the declaration. (See *Hornbeck v. Westbrook*, 9 John. 74. *Dutch Ch. Schenectady v. Vedder*, 4 Wend. 496. *Jackson, ex d. Hardenburg, v. Schoonmaker*, 2 John. 230.) The vice chancellor concludes thus: "The word use has no artificial meaning," for the statute executes trusts as well as uses. His error lies here. It is the substance of the declaration of the use, which determines whether it is an use executed or a chancery trust. It is not whether he employs the terms use, or trust, or confidence, or with the intent, &c.; for each of these phrases may or may not raise an use executed by the statute, or an executory trust, as has been shown before. When nothing is to be done by the trustee, they have a technical meaning to raise an use executed. The subject is very fully examined by Maddock, (1 *Mad. Ch.* 556 to 577,) where he reviews Lord Hardwicke's opinion in *Bagshaw v. Spencer*, Lord Mansfield's remarks upon it, and Mr. Fearne's observations on trusts executed and executory. The rule seems to be an inflexible one. Wherever there is nothing to be done by the trustee, the use is executed, whatever may have been the terms employed by the grantor, and however he may have supposed his grant would operate; and this on reasons founded on public policy.

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If such be the doctrine the courts have only to expound the law ; to declare it. They will not speculate as to the better way for the grantor to have done. They simply declare the effect by the rules of law of what he did do ; not frame a trust to suit their notions of what he meant to do.

*A. C. Paige*, for the respondent. The lease and release of N. Vander Volgen, to Joseph C. Yates and others, conveyed a valid trust estate to them in trust for the members of St. George's Lodge, in perpetuity, which will be supported in equity. The conveyance was by lease and release, by N. Vander Volgen to Robert Alexander and others in fee, upon trust, to the use of C. Van Dyke and others, members of St. George's Lodge, and all others *who then were*, or thereafter should become, members of the same, their survivors and successors forever. Under this conveyance the legal estate passed to the releasees, Alexander and others, in fee, who became trustees, seised of the premises, in trust for the members of St. George's Lodge, in perpetuity, for whose benefit the conveyance conveyed the equitable estate. A valid trust was created by this conveyance, in favor of the members of St. George's Lodge, which a court of equity will enforce. This was not a conveyance merely of a use to such of the members of St. George's Lodge as were specially named in the release, and for their joint lives only, which the statute of uses executed, to the exclusion of all the other present and future members of the lodge. But it was a trust not within the statute of uses, and unexecuted by it. The members of St. George's Lodge, by that description, could not be grantees in a common law conveyance, or as the cestuis que use in a conveyance under the statute of uses, not being a corporation, or persons certain ; but they could by that description take a beneficial interest in a trust estate. (*Jackson v. Corey*, 8 *John.* 301.) A trust is a use not executed by the statute of uses ; but it is what a use was before the statute of uses. (4 *Kent's Com.* 303, § 61. *Cruise, tit. 12 Trust, ch. 1, § 2.* 1 *Hil. Ab.* 201, § 3. *Fisher v. Fields*, 10 *John.* 495.) Such uses as were not provided for by the statute of uses were left to their former operation. The provisions of the statute

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were not deemed co-extensive with the various modes of creating uses. (*Cruise, tit. 12 Trust, ch. 1, § 2.*) Uses not abolished by the statute of uses, continued to exist under the name of trusts; and were taken notice of and supported by the court of chancery under that name. (*Id. § 1.*) A cestui que use in esse is necessary to the execution of a use by the statute. If, therefore, a use is limited to a person not in esse, or uncertain, the statute has no operation. (*Cruise, tit. 11 Use, ch. 3, § 29.*) Contingent uses could be limited before as well as after, the statute of uses. (4 *Kent's Com.* 298, 290 to 301, § 61.) Thus a contingent remainder might be limited by way of use, to a person not ascertained, or not in esse; as, to the use of A. for life, remainder to his first and other sons in tail, A. at the time having no sons, (or remainder to the right heirs of J. S.; J. S. being living,) the contingent uses to the first and other sons of A. could not be executed, because the sons were not in esse. When A. had a son, a use vested in him, and the statute then transferred the legal estate to the use. Until such uses were executed they remained as they were before the statute. The possibility of entry in the feoffees to uses, was deemed sufficient to support the contingent uses when they came in esse. (*Cruise, tit. Remainder, ch. 5, §§ 1 to 6. Id. ib. ch. 1, § 16. Id. tit. Use, ch. 4, § 3. Coke Lit. H. & B. Notes, n. 2, 31. Chudleigh's case, 1 Coke R. 100, 133. Kent's Com. 2, 41, § 59. Shep. Touch. 505, 6. 1 Atk. 593.*) The counsel for the appellants contends that the grantor, by the conveyance in question, conveyed nothing but a life estate, to endure no longer than the life of the last survivor of the cestuis que use named in the deed; and that on his death the estate reverted to the devisees of the grantor. And he contends that the cestuis que use specially named, were alone able to take the use expressed; that the use was only for their lives, no terms having been employed to pass the inheritance to them; that the statute immediately executed the use; and that the remainder of the use resulted to the grantor, and by operation of the statute vested in him the reversion in fee, after the determination of the life estate of the cestuis que use. The fallacy of this argument consists in as-

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suming that the use declared was only for life, and was confined to the cestuis que use specially named, and was executed by the statute of uses; and that the members of the lodge, other than those specially named in the deed, were incapable of taking any estate, legal or equitable, under the deed, for want of being described with sufficient certainty; whereas, we say, that the use declared in favor of the members of St. George's Lodge, was not a statute use, but a valid chancery trust, created in favor of all the then present members and the future members of the lodge, not executed by the statute; or, if executed, only executed as to the members of St. George's Lodge, as they from time to time came to be in esse.

The question whether parties take a trust estate, or a use executed by the statute, depends on intention. (4 *Taunt.* 774. *Co. Lit.* 290, b, n. 249, sub. 6.) The intent here was indisputably to give the use of these premises to the members of St. George's Lodge, in perpetuity. That could only be done by creating a trust in their favor. A conveyance to the members as such, would have been void for uncertainty. If to St. George's Lodge, it would have been void, because the lodge was not a corporation. To hold that the use declared by the conveyance was only for the life of the cestuis que use specially named, and that the statute executed the use, would defeat the intent of the parties, and the whole object of the purchase. Such a construction would deprive the purchasers of an estate of inheritance for which they paid a full consideration, and of the use and enjoyment of the premises before the dissolution of the lodge; until which time, at least, it was intended that the estate should continue in the members of the lodge. The general intention of the parties to the conveyance, being that the estate conveyed should belong to the members of St. George's Lodge in perpetuity, or as long as the lodge remained in existence, such a construction will be put upon the deed as will carry into effect this general intent. (*Jackson v. Beach*, 1 *John. C.* 399. *Jackson v. Myers*, 3 *John.* 388.) In *Gregory v. Henderson*, (4 *Taunt.* 772,) Gibbs, J. says: Where there is a devise to A. and his heirs, to the use of B. and his heirs, the court will not

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hold it a use executed, unless it appears by the whole will that such was the testator's intent. (1 *Hil. Ab.* 203, §§ 12 to 14, 16, 19, 21, 22. 12 *Pick.* 152. 16 *Id.* 330, 327. 7 *T. R.* 552.) If a deed cannot operate in the manner intended by the parties, it will be construed to operate in some other manner. (*Cruise, tit. Deed, ch. 23*, §§ 17 to 23. *Goodtitle v. Bailey*, *Cowp.* 597, *per Lord Mansfield*. *Roe v. Tanner*, 2 *Will.* 77, *per Willes, Ch. J.*) By intent, is not meant the intent of parties to pass the land by this or that particular kind of deed, &c. but an intent that the lands shall pass at all events, one way or the other. This case shows how far courts carry the doctrine of bending the rigid rules of verbal construction, to carry into effect the manifest intent of the parties. (7 *Petersd. Ab.* 687, *Deeds, construction of*, 692. *Cholmondeley v. Clinton*, 2 *B. & A.* 625. 2 *M. & S.* 363. *Jackson v. Myers*, 3 *John.* 395. *Jackson v. Beach*, 1 *John. Ca.* 399. *Troop v. Blodgett*, 16 *John.* 172. *Cholmondeley v. Clinton*, 2 *Jac. & Walk.* 70, 79, 80, 81, 91 to 98, 100, 101, *per Sir Thomas Plumer, Master of Rolls*. *Parkhurst v. Smith*, *Willes*, 332, *per Lord Ch. J. Willes*.) The intent here was to pass the equitable estate to the members of St. George's Lodge, in perpetuity. This intent can only be carried into effect by construing the estate created as being a chancery trust in the members of St. George's Lodge, and not a statute use. And under the authority of the above cases, the court will therefore hold it a chancery trust. The following rules of construction of deeds seem to require that the estate shall be deemed a trust, viz. The intention of the parties is to prevail; the construction is to be made on the entire deed; stress is not to be laid on the strict meaning of words; the construction is to be most strongly against grantor; if the deed will bear two constructions, the one favorable to law and justice is to be adopted; to effectuate the intent of the parties, mistakes will be corrected, and omissions supplied; and where a deed may enure in different ways, the grantee shall elect which way to take it. (*Cruise, tit. Deed, ch. 23*, §§ 1 to 25.) See the cases stated in 7 *Petersd. Ab.* pp. 687 to 690, 692, showing how far courts go to give effect to the intent of the parties.



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(1 *Inst.* 183, a. *Id.* 42, a. *Id.* 273, b.) It may be made a question, whether upon a bargain and sale for one year, and a release, (as in this case,) a statute use could be limited to any person other than the bargainee and releasee; and whether, upon such a conveyance, the legal estate does not vest in the grantee named therein, the lease and release being a single conveyance; (4 *Kent's Com.* 494;) upon the ground that being deemed a bargain and sale, the statute executes the use in the bargainee, and therefore cannot execute a second use in the cestuis que use named. And whether the interest of the cestuis que use in such a conveyance can be supported in any other way than as a chancery trust. This is the rule applied to a deed of bargain and sale. (2 *Bl. Com.* 335, 6, 7.) It was also applied in *Jackson v. Cary*, (16 *John.* 302,) to a bargain and sale for one year and a release. The only distinction between that case and this, is that there the *habendum* clause stated that the premises were to be held to the use of the grantees or bargainees, in trust, &c. But the court, in their opinion in that case, relied upon no such distinction. If this rule applies to this case, then the legal estate vested in the grantees, one of whom (J. C. Yates,) was alive when the original bill was filed; and no use in the cestuis que use was executed, and no use resulted to the grantor.

Many adjudged cases can be referred to, to show that the conveyance of N. Vander Volgen created a valid chancery trust, in perpetuity, in favor of all the members of St. George's Lodge, present and future; and that the members of St. George's Lodge were capable, by that description, of taking an equitable estate, and that the legal estate was conveyed to, and vested in, the releasees as trustees, and was not, by the statute of uses, transferred to any use in the cestuis que use specially named, or to any supposed resulting use in the grantor. The use limited to the members of St. George's Lodge, is not void on the ground of uncertainty. For before and since the statute of uses, uses could be limited to persons not in esse, and uncertain. (*Chudleigh's case*, 1 *Coke's Rep.* 100 to 131.) The uses so limited, remained contingent until the cestuis que use came in

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esse, and then were executed ; or, they were sustained as trusts. (*Id.* 133.) In the conveyance in question, there is no greater uncertainty of description of the cestuis que use, than in the ordinary cases where the use was limited to the sons of A., (A. at time having no sons,) or to the eight heirs of I. S. (I. S. being living.) In such cases the uses are valid. (*Cruise, tit. Remainder, ch. 5, §§ 1 to 6. Id. ch. 1, § 16. Cruise, tit. Use, ch. 4, § 3. Co. Lit. H. & B. n. 231. 4 Kent's Com. 237 to 242, § 59. Cornish on Uses, 69, §§ 3, 132. 3 Vol. Law Lib. Shep. Touch. 505, 6.*) In *Jackson v. Sisson*, (2 *John. Cas.* 321,) there was a patent of certain lands to A., B. & C., for themselves and their associates, being a settlement of Friends on the west side of Seneca lake ; to have and to hold the same to A., B. & C., as tenants in common, for themselves and their associates, in fee. Kent, J. held that the associates, by this description, had an interest in equity, and that A., B. & C. were trustees for the association. In *Jackson v. Brooks*, (8 *Wend.* 426,) patent to R. and four others, in behalf of inhabitants of town of S., their associates, heirs, successors and assigns ; and deed of confirmation to grantees in trust for themselves and the other inhabitants and freeholders of the town of S., their heirs and assigns forever. Savage, Ch. J. (*p.* 452,) regards the inhabitants, by this description, as having a valid trust estate in the lands. And the case necessarily adjudges it a valid trust, as it decides that the act of the legislature, transferring the trust estate to the city of Schenectady, passed the title both legal and equitable. (*S. C. decision affirmed in court of errors, 15 Wend.* 111.) In *Reformed Dutch Church, &c. v. Veeder*, (4 *Id.* 494,) where a grant was made to individuals for the use of a church, which at the time was not incorporated as such, held that the persons to whom the grant was made, stood seised to the use ; and when the church afterwards acquired legal capacity to take and hold real estate, the statute executed the possession to the use, and the estate vested. In this case, Ch. J. Savage says : The patentees of the town of Schenectady held in trust for the town of Schenectady. That they held the legal estate. He thus affirms the validity of that trust ; also, the validity of

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the trust for the church of Schenectady, a body unincorporated, and not capable of taking or holding the legal estate in real property. This case is, in principle, precisely like the present one. A limitation to the use of the poor of a parish, was held good as a trust, though not as a use. (2 *Vern. R.* 387. *Gilb. on Uses*, 44. *Attorney General v. Clark*, Amb. 422. *Jones v. Williams*, Id. 651. 1 *Coke's Rep.* 25; and cases cited as reported by Benlowe.) Feoffment by lord of manor to trustees in trust that inhabitants of A. might forever have a school and site of school house, was held valid as a trust. (*Attorney General v. Hewer*, 2 *Vern. Rep.* 387.) Grant by dean and chapter, &c. of a piece of ground to parishioners of St. Margaret, &c. who afterwards erected a chapel thereon, held valid as a trust. (*Herbert v. Dean & Chapter of Westminster*, 1 *Peere Wms.* 773.) Grant to wife of J. S. (J. S. at the time having no wife,) or to his first son, or second son, or to all his sons, or to right heirs of J. S., (J. S. being living,) was held good by way of contingent remainder, or contingent use. (*Shep. Touch.* 236. *Wells v. Fenton*, *Cro. Eliz.* 826.) Devise of a messuage to testator's wife and her heirs, on condition to convey same in convenient time, &c. for establishment of a grammar school forever; held that the condition was good as a charitable use; and that for a breach, the heir might enter. (*Porter's case*, 1 *Coke's R.* 22, b.) In conveyances to uses, future limitations, where no particular estate has been created, may be supported either in the shape of remainders or springing uses. (1 *Saund. on Uses & Trusts*, 136, 7. 1 *Atk.* 586. 2 *Salk.* 675.) If A. make a feoffment in fee to the use of B. and his wife that shall be, though the whole estate vest in B. at first, yet on his marriage, his wife shall take jointly with him. (1 *Saund. on Uses & Trusts*, 135, 6, and cases there cited, viz. *Dyer*, 274, 276. 1 *Coke*, 101, a. 13 *Id.* 57. *Mood.* 64. 2 *Bro. Ch. Cas.* 233. *Wells v. Fenton*, *Cro. Eliz.* 826. *Woodliff v. Drury*, Id. 439.) A use to a person uncertain, is not void in the first limitation, but it is not executed until the person be in esse. (22 *Viner's Ab. tit. Uses*, 247, 8, E. § 7.) If a use is limited to two jointly, not in esse, and one comes to be in esse, he shall take the en-

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tire use; yet if the other afterwards comes in esse, he shall take jointly with the former. (*Id.* 256, § 2.) In recommendatory trusts, in respect to certainty in description of objects or persons, it is not indispensable that the persons should be described by their names; but more general descriptions will amount to a sufficient designation of the person to take, as sons, children, family relations, if the context fixes the particular persons who are to take, clearly and definitely. (2 *Story's Eq.* § 1071. 2 *Bro. Ch.* 38. 3 *Meriv.* 437. 1 *Pow. on Dev. by Jarman*, 274, n. 7. *Id.* 200, n. 3. *Jeremy's Eq. Jur. B.* 1, ch. 1, § 2, p. 100, 101. 17 *Ves.* 255; *S. C.* 19 *Id.* 301. 8 *Id.* 604. 9 *Id.* 319. 2 *Story's Eq.* § 1065.) In *Stubbs v. Largon*, (2 *Keene*, 255,) before Lord Langdale, in 1837, the testatrix gave certain leasehold premises to trustees in trust, after the decease of B. S., to dispose of and divide the same unto and amongst her partners, who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit: held that this was a good devise to the persons, to whom it was ascertained that the testatrix had disposed of her business in her lifetime. Counsel for defendant objected that the devise was void for uncertainty; the objects of the devise not being sufficiently defined. The master of the rolls says: "If the description be such as to distinguish the devisee from every other person, it is sufficient." His decision was afterwards affirmed by Lord Cottenham. (3 *Mylne & Craig*, 509.) The Lord Chancellor says: "Devisees may be ascertained not only by future natural events and contingencies, but by acts of third persons." (See also *Sandford v. Raikes*, 1 *Meri.* 653. *Clapton v. Bulmer*, 5 *Mylne & Craig*, 108; *S. C.* 10 *Sim.* 426.) Where the lord of the manor grants certain parcels of common to trustees for the benefit of themselves and the rest of the tenants of the manor, in lieu of their claims of common in the rest of the common lands in the manor, the whole interest passes from the lord, and there is no resulting trust for heirs as to the ownership of the soil. (*Irwin v. L'impson*, 7 *Bro. P. C.* 306. *Grovenor v. Hallum*, *Amb.* 643.) Devise of messuage

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subject to annual payment of forty shillings to church wardens of two different parishes forever, to be laid out in repairing the testator's family vaults in each parish; held, that although church wardens could not take, yet the devise was good, and the heir at law was trustee. In *Attorney General v. Cook*, (2 *Ves. sen.* 273,) a devise of an annuity to a Baptist minister and his successor in office, was held valid. (*Attorney General v. Downing*, *Amb.* 550, 571. 1 *Dickens*, 414.) Devise to trustees, of an estate, upon trust with the rents to establish a college, and after the foundation and incorporation of the college, in trust for the collegiate body and their successors forever, held valid. A similar devise for building a hospital, &c. held valid by Lord Hardwicke, in *Addington v. Cann*, (3 *Atk.* 141.) Devise by testator, after death of his wife, to the principal, fellows and scholars of Jesus College, Oxford, and their successors, to find a scholar of his blood from time to time; held good in equity. (*Floyd's case*, *Id.* 6. *Hob.* 136.) *Doe v. Copestake*, (6 *East*, 328, 1805.) Devise of land to trustees, their heirs or successors, in trust, to be applied by them and the officiating ministers, for the time being, of a Methodist congregation, as they shall, from time to time, think fit to apply the same; held not a devise to charitable uses within the act of 9 Geo. 2, c. 36, and that the trustees were entitled to recover the premises at law. (*Morice v. Bishop of Durham*, 1 *Ves. jun. N. S.* 399.) *Inglis v. Trustees of Sailors' Snug Harbor*, (3 *Peters*, 113.) Devise to chancellor of state of New-York, and recorder of city of New-York, &c. and their successors in office, in trust to erect an asylum for the purpose of maintaining aged and decrepit sailors, institution to be perpetual; held a valid devise to divest the heir of his legal estate, or at all events to affect the lands in his hands with the trust. If, in *Baptist Association v. Hart's Ex'rs*, (4 *Wheat.* 27,) the devise had been to a trustee capable of taking the legal estate, upon the same trusts, the devise would have been held valid. (3 *Pet.* 113.) *Coggeshal v. Pelton*, (7 *John Ch.* 291.) Legacy of a sum of money to town of Rochelle (not a corporation) for the purpose of erecting a town house for transacting town business, held val'd as a charitable bequest.

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*Potter v. Chapin*, (6 *Paige*, 649.) Held by the chancellor that chancery will sustain a gift, bequest or dedication of property to public or charitable uses, for the benefit of a community not incorporated; provided the same is consistent with local laws and public policy; and where the object of the gift or dedication is specific, and capable of being carried into effect, according to the intention of the donor. In *Witman v. Lex*, (17 *Serg. & Rawle*, 88,) held that a bequest to St. Michael and Zion churches in Philadelphia, the interest to be laid out in bread annually for ten years, for the poor of the Lutheran congregation, was a valid bequest. See *Com. Dig.* 269, *tit. Charitable Uses*, as to appointments to charitable uses. Some of the above English equity cases are bequests for charitable purposes. But I deem them applicable; because the court of chancery in England had original jurisdiction over bequests to charitable uses upon the doctrine of the common law, independent of the statute of 43 Eliz. called the statute of charitable uses. And the court of chancery in this state has the same jurisdiction, although the English statute of charitable uses has not been re-enacted here. (4 *Kent's Com.* 507, 8, § 68. 2 *Id.* 287, 288, and note d, § 33. *McCartee v. Orphan Asylum Society*, 9 *Cowen*, 464, 474, 475, 488, *per Chan. Jones*.) We have no statute like 9 Geo. 2, ch. 36, prohibiting or restricting devises to charitable uses, nor any statutes of mortmain. (9 *Cowen*, 451, 2.) Devises to charitable uses generally, by interposing a competent trustee, were valid at the common law. And the court of chancery, in analogy to other cases of trusts, held the feoffees to such uses, accountable in equity for the due execution of them. (2 *Story's Eq.* §§ 1145, 1146. *Anon.* 1 *Ch. Cas.* 207. *Attorney Gen. v. Tancred*, 1 *W. Black.* 90.) The court of chancery exercises jurisdiction over charities, because they come under the head of trusts. (1 *Story's Eq.* § 1136.) If it were necessary, we could insist that the grant in this case to the members of St. George's Lodge was for a charitable purpose. The principal object of the order of freemasonry being, as appears from its history, the affording relief and assistance to the indigent members of the fraternity, and their families.

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The validity of grants and devises to charitable uses, was only questioned at common law, where no trustee, capable of taking the legal estate at law, was interposed; as a grant or devise directly to a non-existing corporation, or to an unincorporated society. If the grant or devise was to a person having sufficient capacity to take as grantee, or devisee, in trust for, or to the use of, an unincorporated community, for a charitable purpose, or otherwise, consistent with local laws or public policy, such grant or devise was valid. (2 *Kent's Com.* 287, 8, and notes, § 33, 2d ed. 2 *Story's Eq.* §§ 1145, 6, 3d ed. 4 *Kent's Com.* 507, 8, 2d ed. § 68. 9 *Cowen*, 488, opinion of *Chan. Jones*.) This opinion was undisturbed by the decision in the court of errors. (2 *Kent's Com.* 288, note a. *Trustees of Baptist Asso. v. Smith*, 3 *Peters*, App. 484; opinion of *Story*, J. p. 497. 6 *East*, 328.) This principle was conceded on the argument in *Coggeshall v. Pelton*, 7 *John. Ch.* 293. 3 *Peters*, 113.) In the present case the grantees were persons capable of taking the legal estate.

The conveyance in question conveyed to all the members of St. George's Lodge, present and future, an equitable estate in perpetuity, by means of the terms, and other members of St. George's Lodge, and all others who then were, or thereafter should become members of the same, their survivors and successors forever. The use limited to the members of St. George's Lodge, not being a use executed by the statute, but a chancery trust, it is not subject to the rules which, before the statute, were applicable to conveyances of real estate; but being what a use was before the statute of uses, the same rules apply to it which were applied to uses before the statute. And chancery, in exercising its jurisdiction over trusts, is not bound by the technical rules of law, but may take a wider range in favor of the intent of the parties. Thus a trustee, or cestui que trust, will take a fee without the word 'heirs,' when a less estate will not satisfy the object of the trust. And chancery will, in such case, decree an execution of the trust in fee. (*Fisher v. Fields*, 10 *John.* 495, and cases there cited. *Id.* 505, 6, 7. *Jackson v. Myers*, 3 *Id.* 388, 396, 22 *Vin. Abr. tit. Uses, O, (S.)* § 3, and

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note to § 3. *Gillb. Law of Uses*, 17, 18. *Cruise, tit. 11, Use, ch. 2*, § 26. 1 *Rep.* 87, b, 100, b. 1 *Hil. Abr.* 193, § 19. 4 *Kent's Com.* 303, 4, § 61. *Bac. Abr. tit. Uses and Trusts, D.* 4, 5, note. 1 *Hil. Abr.* 204, § 25.)

No use or trust resulted to the grantor. But the whole legal estate passed to, and vested in the releasees in fee, in trust for the members of St. George's Lodge. And if the trust ever ceases, by the extinction of the lodge or otherwise, the premises will not revert to the heirs or devisees of the grantor. No trust can result to the grantor, against the intention of the parties, (2 *Paige's Ch. Rep.* 217;) nor in opposition to the express terms of the conveyance; especially where the conveyance is with warranty, as in this case; (1 *Id.* 494;) nor in opposition to the written agreement of the parties. (2 *Id.* 265. 6 *John. Ch.* 111. 5 *Paige*, 114. *Hawkins v. Chappel*, 1 *Atk.* 621.) The office of a resulting trust is to carry into effect the intention of the parties, not to defeat it. (2 *Paige* 265.) When the whole legal estate

devised away, no trust will result to the grantor or to his heir. (*Hawkins v. Chappel*, 1 *Atk.* 521. 9 *Cowen*, 502, *per Chan. Jones*.) In the present case the whole legal estate was conveyed; and if a trust results, it will defeat the manifest intention of the parties. Where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate, the beneficial interest; if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, and does not result. (*King v. Denison*, 1 *Ves. & B.* 272, 3. *Cruise, tit. Trust, ch. 1*, § 41. *Hill v. Bishop of London*, 1 *Atk.* 618.) Here the intent was to give the whole beneficial interest to the members of the lodge. Where there is any circumstance to show the intent of the parties to have been that the use should not result, it will remain in the persons in whom the legal estate is vested. (1 *Cruise, tit. Use, ch. 4*, § 38. *Dyer*, 166, a.) Where the contract is for the purchase of the absolute fee simple, the consideration extends to the entire use; and the payment of the consideration divests the grantor of any beneficial interest; and if any part of the use remains unlimited, it will vest in the purchaser. (1 *Saund.*



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on *Uses and Trusts*, 105. *Pelly v. Madden*, 21 *Vin. Abr.* 498, pl. 15. 22 *Id.* 215, *Uses, O. (S.)* § 3 and note.) Here the absolute fee simple was purchased, and a money consideration paid therefor. If A. limits the whole fee simple of use out of land, and part thereof to a person uncertain, it shall never return to the feoffor by way of fraction of a use. (22 *Vin Abr. Uses*, 279, § 10. *Bal. Read. on Stat. of Uses*, 350. *Cook v. Hutchinson*, 1 *Keen*, 43, before Lord Langdale.) When father conveyed to son, and declared the trusts, as to part, in favor of his wife and daughters, but not as to surplus; held that the surplus did not result to the grantor, but belonged to the son. The master of the rolls says that "to determine whether there is a resulting trust to the grantor, it is necessary to look carefully to the language of the deed, and to the circumstances of the particular case. A resulting trust cannot take effect, where a contrary intention, to be collected from the whole instrument, is indicated by the grantor." The intention of the grantor as indicated by him, in the conveyance in this case, was to convey an absolute fee simple to the grantees, in trust for the members of St. George's Lodge forever. He received a full consideration. He conveyed with warranty. He covenanted to make further conveyances to perfect the title. He parted with all his interest. The object of the conveyance was to furnish a site for a building, for the purposes of the lodge. The language of the deed, and the circumstances of the case, show that it was not the intent that any use or trust should result to the grantor. If a trust is held to result, it will defeat the intention of the parties, and the whole object of the purchase. And as the whole legal estate in fee was granted by the grantor for a full money consideration, if the trust ceases, the estate will, under the decisions in the foregoing cases, remain in fee in the grantees, or in the cestuis que use named in the deed, or in those who shall have come in esse. If the estate passed through the grantees, and vested in the cestuis que use specially named, they took for themselves, and in trust for the other present and future members of the lodge. And in that event the trust did not fail by the death

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of the trustee; and chancery will appoint a trustee to uphold the trust.

This being a chancery trust, the court will so construe the conveyance creating it, or will so model it, as to carry into effect the manifest intent of the parties. Chancery, in exercising its jurisdiction over executory trusts, is not bound by the technical rules of law, but may take a wider range in favor of the intent of the parties. (*Fisher v. Fields*, 10 John. 495. 1 Fonb. Eq. 396, note. *Hopkins v. Same*, 1 Atk. 593. *Roe v. Tanner*, 2 Wils. 77. 1 Saund. Uses & Trusts, 122, 3. 1 Coke, 100, b. 1 Kent's Com. 303, § 61. *Cholmondeley v. Clinton*, 2 Meri. 173, 358. 2 Jac. & Walk. S. C. pp. 70, 79, 80, 81, 91 to 98, 100, 101, per Sir Thomas Plumer, master of rolls.) Uses executed, and mere trusts, stand on different foundations. (1 Atk. 593. *Shep. Touch.* 106, note. 2 Story's Eq. 1066.) Chancery can mould the terms of a deed or will creating a trust, so as to carry into effect the intention of the parties. (2 Jac. & Walk., pages above referred to.) Intention prevails against the legal import of words. (*Id.* 95.) Technical meaning and inference is controlled by the manifestation of a contrary intent. (*Id.* 101.) Courts of equity will supply omission of word 'heirs, when intention so requires. (2 Hil. Abr. 3, § 12. 2 Jac. & Wal. 274. *Vin. tit. Grants*, 99, R. 12. *Cary's Rep.* 23, 29, pl. 8.) Where the words "shall stand and be seised" were omitted in a deed of settlement, chancery granted relief. (*Chan. R.* 162. *Thin v. Thin*, *Vin. Abr. tit. Grants*, 99, R. 11, 12.) Hardwicke, Ld. Chan. said, All trusts are executory, and the court must decree a conveyance, when asked at the proper time. (*Hopkins v. Same*, 1 Atk. 593.) They are construed liberally. (1 Hil. Abr. 202, §§ 6, 7. *Cruise, tit. Trust*, ch. 1, § 72.) A trust executed is now a legal estate. (*Id. per Ld. Hardwicke.*) Executory trusts in equity are susceptible of various modifications and constructions, not applicable to *executed* trusts. (1 Story's Eq. §§ 64 to 66. 1 Fonb. Eq. B. 1, ch. 3, § 1, p. 147, note C.) In executory trusts, the court must follow the intention of the parties, so far as the rules of law will admit, howsoever improperly or imperfectly the will or deed may be penned

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(1 *Atk.* 513. 2 *Meri.* 173, 358; *S. C.* 2 *Jac. & Walker*, pp. 70, 79, 80, 81, 91 to 98, 100, 101, *per Sir Thomas Plumer.*)

It does not follow, as contended by the complainant's counsel, that a use must be executed by the statute, where the trustee has no power of management or disposition. Whether the trustee, or cestui que trust shall take the legal estate, depends upon the intention of the parties, or of the testator. (1 *Hil. Abr.* 203, §§ 12, 13, 14. 12 *Pick.* 152. 16 *Id.* 330.) The law vests the legal estate in the trustee, and gives the cestui que trust an equitable interest, where this will best effect the object in view; as where provision is made for the separate benefit of a married woman. (1 *Hil. Abr.* 203, §§ 16, 18, 19. *Cruise*, ch. 1, §§ 19 to 22.) In such cases, the estate is held a trust, and not an executed use. (1 *Id.* §§ 21, 22. 16 *Pick.* 327. 7 *Term Rep.* 652.) Contracts of purchase create a trust, although the trustee has no power of management. So a purchase in the name of a stranger. In these cases the legal estate remains in the trustee. So when the cestui que use is not in esse, the legal estate continues in the trustee. (*Cruise*, tit. *Trust*, ch. 1, §§ 30, 31. 4 *Kent's Com.* 241, § 59. 1 *Saund. Uses and Trusts*, 328.) So expressly held in *Reformed Dutch Church v. Veeder*, (4 *Wend.* 497.)

The covenant for further assurance, in the conveyance in question, estops the devisees of the grantor from claiming a resulting trust in the premises, or that the same have reverted to them. This covenant was inserted to remedy any possible defect in the conveyance. And a specific performance of it by the representatives of the grantor may be compelled. (3 *Law Lib. Platt on Cov.* 340, § 5, and p. 353.) The complainants are obligated in equity to make such further conveyances on request, as are necessary to perfect the title in the members of St. George's Lodge, in accordance with the original intent of the parties. The interest claimed in the premises by the complainants, did not pass to them under the wills of Nicholas Vander Volgen and Peter Vander Volgen. The testator was not seised at the time of making his will, and did not die seised. (*Cruise*, tit. 38, ch. 3, § 27.) The will does not operate on

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lands acquired after its execution. (*Ib.* § 38. 2 *Paige's Rep.* 358.) Here the whole fee was granted. If it subsequently reverted, it was an estate acquired subsequent to the execution of the will. Like the case of an estate in terms absolutely devised, but which afterwards is found not to have been legally and effectually devised, (6 *Paige*, 600.) If the trust, on the death of J. C. Yates, did not devolve on the court of chancery, it vested in his legal representatives. (7 *Paige's Rep.* 107.) And the members of St. George's Lodge, and the legal representatives of J. C. Yates, have the same rights in the proceeds of the premises which they had therein before they were taken and appropriated by the U. & S. R. R. Company.

THE CHANCELLOR. It is not material in this case to inquire whether the legal title to the premises, at the time they were taken for the use of the rail-road, was in Joseph C. Yates, as the survivor of the parties of the second part in the deed of 1790, or in the heirs of L. Vrooman, who was named in such conveyance as one of the members of the lodge, as well as one of the parties of the second part. For if the legal title was in either, as a trustee for the members of the lodge, or for his or their own benefit, the complainants have no legal or equitable title to the fund in question, as the heirs or devisees of the grantor in that conveyance.

It is alleged, in the answer, that Joseph C. Yates, one of the grantees in the conveyance of 1790, was one of the members of the lodge, and continued so until his death. It is also probable that all the grantees were members, as well as the thirteen persons named in the deed as such. But as the answer is not responsive to the bill in this respect, and there is no proof of the fact, the court cannot act upon that presumption, in the decision of this case. It does appear, however, from the deed itself, that Lawrence Vrooman, one of the lessees of the term for a year, and one of the grantees to whom the reversion is conveyed in fee, by the deed of the 27th of April, 1790, was one of the thirteen members of the lodge specifically named in that deed. And as the conveyance is declared to be a trust

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for the use of these thirteen members, and other persons who were then members of the lodge, as well as for the use of those who should thereafter become such members, it may legally be presumed that there were, at the time of the conveyance, other members of the lodge besides the thirteen persons whose names were mentioned in the deed. In determining the question whether the deed operated merely as a conveyance of the legal title of the lot, to the thirteen persons named in the conveyance, as being members, and to the survivors of them for life, only, as an executed use for their individual benefit merely, it must be remembered that the deed of the 27th of April, 1790, was not a mere common law release, of the reversion, to the lessees of the premises. But it was upon its face a deed of bargain and sale to the eight persons named therein as grantees and lessees in fee, and upon a consideration purporting to have been paid by them.

Taking the whole conveyance together it is perfectly evident that it could not have been the intention of the parties thereto to vest either the whole legal title, or the whole beneficial interest in the premises, in the thirteen persons therein specifically named as members of the lodge, during the terms of their respective lives, for their benefit and the benefit of the survivor of them, exclusively. On the contrary, the deed shows that it must have been the intention of the parties thereto that it should operate as a conveyance of the legal title of the whole fee of the lot, not for the sole benefit of the thirteen individuals named, for life, with a resulting use to the grantor, but for the benefit of the aggregate body of the members who then constituted, and who should thereafter constitute, the lodge or society of freemasons in Schenectady, called St. George's Lodge. It is true, they could not, in that character, take the legal estate in the premises, as an executed use under the statute of uses; but they could take a beneficial interest in the property, as a charitable use.

It was not the intention of the framers of the statute of uses, to defeat and destroy the beneficial interest of the cestui que use, but only to change his mere equitable interest, in the use

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of the property, into a legal estate, in the property itself, of the same quality and duration. Where the beneficial use, therefore, cannot take effect as a legal estate in the *cestui que use*, it will take effect as a trust, in the same manner as if the statute had not been passed; where it can take effect as a trust consistently with the rules of law. The authorities referred to by the vice chancellor, and by the counsel for the respondent, fully sustain this principle.

In the case under consideration, to give the whole title and beneficial interest in the premises to the thirteen members of the lodge specifically named in the deed, even for life, to the exclusion of others who then were, and those who might thereafter become members, would deprive such other members of the beneficial interests which the parties to the deed intended they should have, in the property, in common with the thirteen members named, or the survivors of them. And to limit the continuance of the legal title conveyed, by the lives of those thirteen persons, would not only deprive the surviving members of the lodge, and their successors, of the continuing benefit which the parties to the deed intended to secure to them, but would be wholly inconsistent with the previous grant in fee to Lawrence Vrooman, one of the thirteen, for a full consideration paid by him and the other seven grantees. The statute of uses, therefore, instead of vesting the legal estate in the thirteen for life, with remainder to the grantor as a resulting use, either vested the whole legal estate in fee in L. Vrooman and his heirs, in trust for himself and his associates, who then were or might thereafter become members of the lodge; or vested it in him and the other persons to whom the bargain and sale was made, and from whom, as the deed states, the consideration proceeded, and to the survivor of them, as trustees, in trust for the use and benefit of those who then were, and those who might thereafter become members of the lodge; as a charitable use. This last construction of the conveyance appears to be most consistent with the intention of the parties to the deed, and with the rules of law. And if the legal title to the premises in fee vested in the seven grantees, and the survivor of them, upon

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such a trust, that legal title was in Joseph C Yates, the surviving trustee, at the time of the commencement of this suit.

The complainants, therefore, were not entitled to the fund in the hands of the respondent, as his executrix; and the bill was properly dismissed by the vice chancellor. Even if there was any technical defect in the deed, so that it would not carry into effect the intention of the parties, the vice chancellor is unquestionably right in supposing the complainants could be compelled to supply such defect, by a further conveyance or assurance of the property. The decree appealed from must be affirmed with costs.

As the *cestuis que trust* were not parties to the suit, the vice chancellor could not properly make any order in this suit disposing of the fund in the hands of the respondent. But as the surviving trustee died subsequent to the revised statutes, the trust devolved upon the court of chancery. The new supreme court, therefore, is authorized to appoint a new trustee of the fund, which has now become a substitute for the land, so that it may be properly invested and applied for the use of those who may from time to time be the members of the lodge; as contemplated by the parties to the deed of April, 1790.

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**THE BANK OF UTICA vs. FINCH and others.**

Where a bond and mortgage are actually given to secure a particular debt mentioned therein, the mortgagee cannot, as against subsequent purchasers or incumbrancers, hold the mortgage as a lien for an entirely distinct and separate debt, upon parol proof that it was intended to cover that debt also.

But where the mortgage is given to secure a particular debt with a condition to be void upon the payment of that debt, the mortgagee does not lose his security by the mere extension of the time of payment; although that extension is in the form of a renewal of the note which was given as a collateral security for the payment of the same debt; where it was not the intention of either party to discharge the mortgage security by such renewal of the note.

A mortgage, or a judgment, may be given to secure future advances; or as a gen-

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eral security for balances which shall be due, from time to time, from the mortgagor, or judgment debtor.

And this security for future advances may be taken in the form of a mortgage, or judgment, for a specific sum of money, sufficiently large to cover the amount of the floating debt intended to be secured thereby.

Where an appeal, by the defendants in a foreclosure suit, has prevented the complainants from obtaining the master's report, and a final decree, for a long time, during which time the respondents have been kept out of the possession of the mortgaged premises, and of the rents and profits thereof, the appellants may be directed to pay to the respondents the rents and profits of the mortgaged premises during the time for which the proceedings have been stayed, by the appeal, or so much of them as may be necessary to pay the deficiency; as the damages of the respondents for the delay and vexation which they have sustained by the appeal, if upon the foreclosure and sale of the premises, under the decree which is finally entered in the suit, it shall turn out that the proceeds of the mortgaged premises are not sufficient to pay the amount due to the complainants, with interest and costs. And if necessary, a reference may be directed, to ascertain the amount of such rents and profits.

THIS was an appeal by the Bank of Rochester, one of the defendants in this cause, from an interlocutory decree of the vice chancellor of the eighth circuit. The bill was filed to foreclose a mortgage upon certain real estate in the county of Monroe, owned by the defendant H. Finch at the time of the execution of the mortgage; under the following circumstances:

Previous to the execution of the mortgage, and at that time, Finch was a dealer with the Bank of Utica, in borrowing money and having notes and drafts discounted by the bank for his benefit. On the day of the date of the mortgage his liabilities to the bank exceeded \$34,000; and as he wished to continue his business with the institution, Finch and his wife agreed to give a mortgage, to cover the liabilities to the bank from time to time, including new discounts and renewals of paper, and subsequent loans. The mortgage in question was accordingly given, on the 10th of September, 1839, and was duly recorded in the county where the mortgaged premises were situated. The condition of the mortgage, however, instead of stating truly the object for which it was given, contained an absolute grant of the premises, in the usual form, and without making the grant defeasible upon the payment of the money



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intended to be secured; and it concluded as follows: "This grant is intended to secure the payment of \$30,000 paid to the parties of the first part by the party of the second part. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in payment of the interest thereof, or any part of the said principal or interest, it shall be lawful for the parties of the second part, or their successors, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law," &c. The paper of Finch, held by the bank at the time of the giving of the mortgage, was renewed or exchanged from time to time, till November, 1841. The average indebtedness for which the mortgage was holden as a security was about \$30,000 during the time; renewals being made and new paper being discounted from time to time, by the bank, upon the security of the mortgage. But of the old paper held by the bank, at the date of the mortgage, only about \$8000 remained unpaid or unrenewed. In December, 1841, Finch made an assignment of his interest in the mortgaged premises to Dixon and Young, in trust for the payment of his debts. In January, 1842, the Bank of Rochester recovered a judgment against H. Finch, the mortgagor, for an amount exceeding \$10,000. But as he had previously assigned all his interest in the mortgaged premises, that judgment did not become a lien thereon.

On the first of August, 1842, the complainants filed their bill in this cause, to foreclose the mortgage, making Finch and wife, the assignees of the mortgaged premises, and some other persons, parties thereto; but the Bank of Rochester was not made a party. A notice of the pendency of the suit and of the object thereof was filed with the clerk of the county of Monroe on the 8th of September thereafter. The Bank of Rochester, upon a petition stating the recovery of its judgment against Finch, but without stating that he had assigned the equity of redemption in the mortgaged premises, before the recovery of that judgment, obtained an order that the complainants should make the petitioners parties to the suit, and they were made parties accordingly. After the Bank of Rochester was made a

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party to the suit, and after the bill as amended had been taken as confessed against the defendants Finch and his assignees, such assignees caused the equity of redemption in the mortgaged premises to be sold, and the Bank of Rochester became the purchaser of such equity of redemption. But as the complainants subsequently amended their bill, the order taking the bill as confessed was thereby opened, and the purchasers thereupon put in their answer denying the validity of the mortgage as a lien upon the premises. A replication to the answer was filed, and the cause was subsequently heard upon pleadings and proofs as to the Bank of Rochester, and upon the bill taken as confessed as to the other defendants. The vice chancellor decided and decreed that the mortgage was a valid lien upon the premises, (except a small portion released from the mortgage, and not the subject of controversy in this suit,) for the amount of the several debts stated in the complainants' amended bill, as due and unpaid; all of which debts were contracted before the assignment of the mortgaged premises to Dixon and Young for the benefit of creditors. He therefore directed a reference to a master to compute the amount due; and authorized the complainants to apply for a decree of foreclosure and sale of the mortgaged premises upon the coming in of the master's report.

The vice chancellor delivered the following opinion :

F. WHITTLESEY, V. C. The defence in this case rests principally upon the language of the condition of this mortgage. The defendant's counsel insists that this instrument, upon its face, shows that it was executed to secure money before that time paid to the mortgagor, and that it applies only to the paper then held by the complainants, which when paid was a payment to that extent upon the mortgage; that it does not cover new paper, discounted after the making of the mortgage; and that parol evidence is not admissible to show for what paper the mortgage was executed, or upon what confidence the subsequent discounts were made, or to explain in any manner the written instrument itself. If this view of the case

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is sustained, it would reduce the lien of the mortgage, as against the Bank of Rochester, to that portion of the original indebtedness of Finch which has continued from the making of the mortgage down to the present time, by successive and direct renewals. This part of the original indebtedness only amounts to \$8000; and from that sum, in this aspect of the case, should be deducted the \$3500 received by the complainants upon the release of the portion of the mortgaged premises which was sold.

A mortgage may unquestionably be taken and held as a security for future advances and responsibilities; and such future advances will be covered by the lien, to the extent of the sum mentioned in the mortgage, in preference to any claim under a junior incumbrance with notice. (4 *Kent's Com.* 175. *Kendrick v. Robinson*, 2 *John. Ch. Rep.* 309. *Brinkerhoff v. Marvin*, 5 *Id.* 326. *Janes v. Johnson*, 6 *Id.* 420.) This general principle is conceded; but it is contended that it is only applicable when the mortgage upon its face provides for security for future advances and responsibilities. This mortgage is taken to secure \$30,000, stated therein to have been paid by the mortgagee to the mortgagor; and it is recorded for that sum, which is all that the record expresses. If there had been no money actually paid, would the mortgagor be prohibited, by his signature to the instrument, from showing that fact by parol? If the mortgagee had not advanced the money until three months after the execution of the mortgage, would he be prohibited from showing this fact by parol? Parol evidence must, it is apparent, in many such cases, be admitted, not to contradict the written instrument, but to show the purpose and intent for which it was executed. Such evidence is admissible even, to show that a deed absolute upon its face was intended as a security for money merely, (*Van Buren v. Olmstead*, 5 *Paige*, 9,) and other similar facts. I am, therefore, of opinion that the parol evidence objected to was admissible, not for the purpose of explaining the written instrument, but for the purpose of establishing the fact that credit had been given to Finch, upon the several discounts for him on the faith of the

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mortgage, and that it was treated by the complainants as a continuing security; so that if it was entitled to that character the complainant may have the benefit of it. (*Douglas v. Reynolds*, 7 *Peters*, 113.) It will be conceded that the doctrine of tacking does not prevail in this court, and it is not upon that ground, as I understand it, that the complainant rests the claim. Here is a mortgage, the record of which is notice to all of an incumbrance to the extent of \$30,000. And I suppose the holder of that mortgage may advance upon it up to that amount, and may be secure in his lien to the extent of his advances, within that amount; such having been the agreement between himself and the mortgagor; unless indeed this lien should be affected by the equities of subsequent incumbrancers, or grantees, attaching previous to any advance. But here there was no right or pretended right of any grantee or incumbrancer attaching at all until after the advances were made. Whether the holder could safely make further advances after such subsequent incumbrance had attached or grant made, unless notice thereof had been given to the holder, is not a question here presented. It has been held that a judgment confessed for \$2000 where there was but \$1000 due at the time, would cover a future advance made under an agreement between the parties; and that an execution might issue for the whole. (*Livingston v. McKinley*, 16 *John. Rep.* 165) A doctrine very similar, and one which seems to me to cover this case, has been held in relation to mortgages. (*Shirras v. Cray*, 7 *Cranch's Rep.* 34.) But in no case, of course, can the holder of a mortgage enlarge his demand, by reason of it, to an amount beyond that which appears upon the record. (*St. Andrew's Church v. Tompkins*, 7 *John. Ch. Rep.* 14.) But up to that amount I suppose he may advance, by agreement with the mortgagor, and hold the mortgage as security for such advances; except as against subsequent incumbrancers or grantees who have given notice of their incumbrances or grants, prior to the advance.

In this case the Bank of Rochester acquired no lien, by virtue of its judgments, upon the mortgaged premises. Finch had

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conveyed to his trustees, before the judgments were obtained. All the title the bank has is by virtue of its purchase from the assignees of Finch; by which the bank acquired the same title to redeem which the mortgagor would have had. This purchase too was made *pendente lite*, and was affected with notice of the complainant's claim. All the complainant's advances had been made before the conveyance by Finch to his assignees.

There is a point made between these parties as to the mill stones, bolts, carding machines, and other things, called and claimed as fixtures, which it seems hardly proper to pass upon in this stage of the case. The mortgage to the complainants was general, including the mortgaged premises and appurtenances. The conveyance from Finch to his assignees was the same, except that it mentioned fixtures, machinery and implements. The deed from the assignees to the Bank of Rochester was general, and referred to the trust deed. It does not purport to convey any personal property, describing it as such, or any thing but real estate. The doctrine as to fixtures varies in different cases, and is drawn from very numerous decisions. As between heir and executor, landlord and tenant, mortgagee and execution creditor, vendor and purchaser, different rules prevail. The doctrine as between vendor and purchaser is the most liberal, in making fixtures real estate, and having them pass with the land. And the same doctrine is applicable as between the mortgagor and mortgagee. (*Union Bank v. Emerson*, 15 Mass. Rep. 159. *Robinson v. Preswick*, 3 Edwards' Ch. Rep. 246.) And mill stones, bolts, and other machinery in a flouring mill were held to go with the lien and not to the executor. (*House v. House*, in *Chancery*, March 7, 1843.) Whatever may be the rights of these complainants as against an execution creditor of Finch, I am now inclined to think that they take as much by their mortgage as the Bank of Rochester can by their deeds. But this question can be decided upon an application for a decree of sale. The mortgage of the complainants must be held to be a lien for all the advances they have made to Finch upon the several notes and drafts set forth in their bill, and which yet remain unpaid; but

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not beyond the amount specified in the mortgage. And it must be referred to a master to compute the amount due upon such drafts and notes, with interest, excluding the costs of the suits at law, (7 *Paige*, 437,) upon such notes or drafts, deducting from the aggregate thereof the amount of deposit to the credit of Finch, and the amount received upon the release of portions of the mortgaged premises; as set forth in the pleadings. All further questions are reserved until the coming in of such report. The complainant is to be at liberty to bring the cause to a hearing upon such report at any general or special term of this court, on due notice.

*A. Taber & M. T. Reynolds*, for the appellants. The complainants' mortgage being a specialty, cannot be enlarged or varied by parol evidence; there being no issue in the case upon any allegation of fraud, mistake, or accident. The complainants' rights and interests cannot rest partly in deed and partly in parol. An equitable mortgage, being created by parol, may, by the same means, be extended to cover future advances. But a legal mortgage, applicable in its terms to a subsisting indebtedness, cannot, by an oral agreement, be thus extended, in this or any other court. The sum of \$3500 received of the Stanleys should be applied to extinguish so much of the original indebtedness, if any remains, covered by the mortgage. The Bank of Rochester, as a subsequent incumbrancer and purchaser of the equity of redemption of Finch, is entitled to redeem, on paying any balance due of the original consideration of the mortgage.

*A. Worden*, for the respondents. The Bank of Rochester has no lien upon the mortgaged premises by reason of its judgments against Finch; those judgments having been obtained after the assignment to Dixon and Young. Whatever rights that bank has, are under the deed from Dixon and Young, executed subsequently to the commencement of this suit. It is, therefore, a *mala fide* purchase, *pendente lite*; and the complainants, as against the Bank of Rochester, are entitled to the same

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decree as they would be upon the bill taken as confessed by Dixon and Young. (7 *Paige*, 291. *Story's Eq. Pl.* 150, § 156. 1 *Story's Eq.* 393, § 406. *Murray v. Finnister*, 2 *John. Ch. Rep.* 155. *Heatley v. The Same*, *Id.* 158.)

The bill charges, and the evidence shows, that the mortgage was given to secure an existing liability from Finch to the Bank of Utica, at its execution; and such future indebtedness as he might thereafter be under, to the bank, on notes and bills discounted by such bank. A mortgage for these purposes was valid; and parol evidence is admissible to show the purposes for which it was given, and the amount secured by it. (5 *Paige's Rep.* 10. 1 *Id.* 77. 2 *John. Ch. Rep.* 309. 6 *John. Rep.* 417. 5 *John. Ch. Rep.* 326. 2 *Cowen*, 292. 7 *Cranch*, 40. 16 *John.* 165. 14 *Ves.* 606. 2 *Ves. & Beame*, 79, 83. 4 *John. Ch. Rep.* 373.) There is no question here between the complainants and bona fide purchasers or incumbrancers, arising under the recording act, or otherwise. The Bank of Rochester is not a bona fide purchaser, and can claim nothing as such. It has not averred, in its answer, that it is a bona fide purchaser without notice; which it should have done, to avail itself of the rights of such purchaser. (*Beame's Eq. Pl.* 246, 247. 1 *John. Ch. Rep.* 566. 2 *Id.* 155, 158. 3 *Id.* 345.)

The mortgage is for the specific sum of \$30,000, and upon the principle for which the appellants contend, it must stand for that amount, between the parties. But the nature and extent of the interest of a mortgagee is not required, by the statute of frauds, to be in writing. The mortgage being executed according to the requirement of the statute, the object and intent of the parties, and the extent and application of the security, may be ascertained by parol; upon the same principle that parol evidence may be resorted to to show the mortgage debt has been paid, or assigned. (*U. S. v. Sturges*, 1 *Paine, C. C.* 530. 7 *Cowen*, 18, 19. 1 *John. Ch. Rep.* 128. *Hughes v. Edwards*, 9 *Wheat.* 495. 1 *Pow. on Mort. Rind's ed.* 143, 144. 14 *Ves.* 606. 17 *Id.* 227. *Ex parte Kennington*, 2 *Ves. & Bea.* 79, 83.) Under the circumstances, and the agreement upon which the mortgage was executed, this court may, and

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so the authorities seem to require, regard the debt now due from Finch as existing at the date of the mortgage. (4 *John. Ch. Rep.* 371, 373. 5 *Paige*, 10.) The notes, to the amount of \$8000, were renewals of similar ones held when the mortgage was executed. And upon the most rigid rule they are secured by the mortgage. The drafts on Carey are substantially continuations of liabilities, against Finch, existing at the date of the mortgage. (15 *John. Rep.* 567, 568. 9 *Mass. Rep.* 247.)

The proof showing that the notes and bills were discounted on the security of the mortgage, was proper, and perhaps necessary. (7 *Peters*, 119.) The recent decision of the court for the correction of errors, that parol proof is not admissible, at law, to show a deed to be a mortgage, has no application.

THE CHANCELLOR. The appellants having purchased the equity of redemption from the assignees after the bill had been taken as confessed against the latter, would have been precluded from setting up any defence which was inconsistent with the admission thus made, by their grantors, of the facts charged in the bill, had not the complainants, by amending their bill, waived their order taking the bill as confessed against the assignees of Finch. But upon the merits of the case, the decision of the vice chancellor was technically correct.

Where a bond and mortgage are actually given to secure a particular debt mentioned therein, the mortgagee cannot, as against subsequent purchasers or incumbrancers, hold it as a lien for an entirely distinct and different debt, upon parol proof that it was intended to cover that debt also. But where the mortgage is given to secure a particular debt, with a condition to be void upon the payment of that debt, the mortgagee does not lose his security by the mere extension of the time of payment, although that extension is in the form of a renewal of the note which is held as a collateral security for the payment of the same debt; where it was not the intention of either party to discharge the mortgage security. (*Heard v. Evans & Isham*, 1 *Freem. Ch. Rep. Miss.* 79.) And in this case there



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was no defeasance of the conveyance, upon the payment of any particular debt, which could technically operate as a discharge of the mortgage lien by a change of the collateral security referred to in the mortgage. There was in fact no such sum as \$30,000 for money paid, as was mentioned in the mortgage. The mortgage, it is true, was given for the nominal sum of \$30,000, but in fact to secure the floating balances, or amount of the notes and bills, which the bank might hold from time to time against the mortgagor.

There are numerous cases in our own courts showing that a mortgage, or a judgment, may be given to secure future advances; or as a general security for balances which may be due, from time to time, from the mortgagor or judgment debtor. And this security may be taken in the form of a mortgage or judgment for a specific sum of money, sufficiently large to cover the amount of the floating debt intended to be secured thereby. The same principle was recognized and acted upon by the supreme court of the United States in the case of *Shirras and others v. Cray & Mitchell*, (7 Cranch, 50,) cited by the respondent's counsel on the argument. Here there was not in fact any debt of \$30,000, for moneys advanced to Finch and wife, which was due and payable as mentioned in the mortgage. There is a large sum due, however, for notes and securities which were then running to the bank, and for other securities subsequently given; all of which securities, or so much as should become due and be payable thereon at the final close of the business of renewing and discounting notes and securities, or advancing moneys by the bank, not exceeding the \$30,000, were intended to be secured by this mortgage.

The decree appealed from, therefore, was not erroneous, and it must be affirmed with costs. And as the appeal has prevented the respondents from obtaining the master's report, and the final decree, for a long time, during which time the appellants have been entitled to the possession of the mortgaged premises, and to the enjoyment of the rents and profits thereof, if, upon the foreclosure and sale of the premises under the decree which may be entered in this suit, it should turn out that the proceeds

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of the mortgaged premises are insufficient to pay the amount due to the complainants, with interest and costs, the appellants must pay to the respondents the rents and profits of the mortgaged premises during the time for which the proceedings have been stayed by this appeal, or so much of such rents and profits as may be necessary to pay such deficiency ; as the damages of the respondents for the delay and vexation which they have sustained by this appeal. And a reference is to be hereafter directed to ascertain the amount of such rents and profits, if it shall be necessary to do so to carry this part of the decree of affirmance into effect.

The master designated in the decree to compute the amount due upon the mortgage, having died since the decree, it may be referred to any other master to ascertain and report the amount. In case the reference shall not have been executed before the first of July next, the complainants are to be at liberty to apply to any justice of the supreme court, either at chambers or at a special term, to designate a referee to execute the reference.

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SARAH M. BUTLER vs. L. M. H. BUTLER and others.

A testator, by the fourth codicil to his will, revoked a certain part of the third codicil, and instead thereof he directed his executors to pay \$500 out of one share, or the fourth part of his estate, to the widow of his deceased son, and to pay over the remainder of that share to H., in trust, to invest the same and to pay over to his granddaughter S. the income thereof semi-annually until her eldest child should arrive at the age of twenty-one years ; and at that period to divide the fund, as it might then exist, into as many shares as there might then be children of S., and to pay over to each child his or her share, upon their arriving at the age of twenty-one years, respectively. The testator's property consisted of personal estate entirely. On a bill by S. against her husband, and her children who were then living, and against the substituted trustee, claiming that the fourth codicil was void, so far as it limited the remainder in one of the shares to her children ; *Held* that the fair construction of the fourth codicil was that the testator referred to the eldest child of S. at the time of making such codicil, as the child upon whose arrival at the age of twenty one, S.'s estate in the income of that fourth of the

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testator's property should terminate; and not to the eldest of her children who should attain the age of twenty-one.

*Held also*, that the fourth codicil should be construed as if the testator had directed the trustee to pay the income of the fund to S. until her oldest child, then in existence, or who might be in existence at the testator's death, should arrive at the age of twenty-one years; or until the time when such child would have arrived at the age of twenty-one years if it had lived to attain its majority. And in case such eldest child should live to attain its majority, then that such one-fourth of the estate should be divided into as many shares as there were children of S. then living, and that one share should belong to each child, and should be payable when they respectively arrived at the age of twenty-one; the income in the meantime to be accumulated for the benefit of such of them as were minors.

*Held further* that this contingent remainder to the children of S. was so limited that it must vest in interest, if ever, during the continuance of one life in being at the time of the death of the testator; which time, in a will, is to be deemed the time of the creation of the estate.

And the eldest child of S. who was in esse at the death of the testator, having lived to attain the age of twenty-one years, *Held* that the contingency contemplated by the testator then occurred; and that the children of S. who were then living thereupon became the absolute owners of the whole of the fund in controversy.

In the construction of wills, if the language of the testator is such that it may be construed in two different senses, one of which would render the disposition made of his property illegal and void, and the other would render it valid, the court should give that construction to his language which will make the disposition of his property effectual.

A contingent remainder may be limited on a term of years; provided the nature of the contingency upon which it is limited is such that the remainder must vest in interest, if ever, during the continuance of not more than two lives in being at the time of the creation of such remainder, or upon the termination of not more than two lives then in being.

THIS was an appeal from a decree of the vice chancellor of the second circuit, dismissing the complainant's bill. The object of the bill was to obtain a judicial construction of the will of Thomas Arden deceased; particularly in reference to the third and fourth codicils. By the third codicil the testator directed his executors to pay to the complainant, his granddaughter S. M. Butler, the daughter of his deceased son Tho's Arden, \$1000 annually, in quarterly payments, for the term of seven years after the decease of the testator, and on the division of his estate, at the end of that time, to pay over to her one-fourth of his estate as it might then exist, and the other three-fourths to Philip Verplanck, Eliza A. Verplanck, and Sally A.

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Mille.; equally. On the 2d of April, 1834, the testator made a fourth codicil, by which he revoked so much of the third codicil as directed that upon the division of his estate one-fourth part thereof should be given to the complainant. And instead thereof, he directed his executors to pay \$500 of that share to the widow of his said deceased son, and to pay over the remainder thereof to S. A. Halsey, in trust for the following purposes: "to invest the same in a manner deemed the most secure by him, and to pay over to S. Mary Butler the income of the same semi-annually until her eldest child shall arrive at the age of twenty-one years; and at that period to divide the same, as it may exist, into as many shares as there may then exist children of the said S. M. Butler, and to pay over to each child his or her share on arriving at the lawful age of twenty-one years."

The testator died in 1834, leaving a large property, consisting entirely of personal estate; and leaving the complainant and the three other persons named as legatees in the third codicil, who were the children of his deceased daughter, his only next of kin. At the death of the testator the complainant had four children; the eldest of whom was born in May, 1825. The sum set off for the share of the complainant and her children, and placed in the hands of the trustee and invested according to the direction contained in the fourth codicil, was about \$43,000.

In November, 1843, the complainant filed her bill in this cause against her husband and her six children who were then living, and against the New-York Life Insurance and Trust Company, the substituted trustee of the fund; claiming that the fourth codicil was void so far as it limited the remainder in that share to her children. Her husband was insolvent. The bill was taken as confessed against the husband and the trustees, and the infants appeared and put in answers by their guardians ad litem. The vice chancellor decided that the limitation over to the children of the complainant who should be in esse when the eldest arrived at the age of twenty-one, was valid in case that event should happen; but that if the eldest child should die under the age of twenty-one, the limitation over would fail.

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He decided, however, that even if the limitation over was invalid, or should fail by the death of the eldest child under the age of twenty-one, the third codicil, which gave the one-fourth of the estate of the testator to the complainant, at the end of seven years from his death, was effectually revoked by the fourth codicil, and that the bill must therefore be dismissed as to the children of the complainant. He made a decree accordingly, and the complainant appealed from that decree to the chancellor.

The following opinion was delivered by the vice chancellor :

C. H. RUGGLES, V. C. The intention of the testator in the fourth codicil of his will, is perfectly apparent. It is as plain as language can make it. Whether it might not have been better to give the fund, or the income of it, to Mrs. Butler during her life, than to give it directly to the children, is a question with which the court has nothing to do. It cannot make a will for the testator. It is bound to carry the testator's intention into effect, if it can be done without violating the rules of law. Assuming that the legacy to the children of Mrs. Butler is contingent and not vested—and so I think it undoubtedly is—the only question is, whether the absolute ownership of the fund was illegally suspended, by that clause in the codicil which postpones the division and payment to the legatees until the eldest child of Mrs. Butler shall arrive at the age of twenty-one years. This is alleged to be a suspension of the power of alienation for an absolute term of twelve years or thereabouts; the oldest child of Mrs. Butler being at the death of the testator about nine years of age. The complainant alleges that the suspension of the absolute ownership of the fund is illegal according to the cases of *Coster v. Lorillard*, (14 *Wend.* 265;) *Hawley v. James*, (16 *Id.* 61,) and *Hone's Ex'rs v. Van Schaick*, (20 *Id.* 566.) The soundness of the complainant's argument depends, I think, on another and previous question, to wit, whether the absolute ownership is suspended during the entire term of twelve years without regard to the life of Eliza, the oldest child of Mrs. Butler; or whether it does not depend

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on her life. What will become of the ownership in case Eliza should die under the age of twenty-one? The complainant's counsel insist that the period of the division of the fund among the children of Mrs. Butler is postponed until the second or some younger child shall have attained that age. But that is not the language of the will. Eliza was the oldest child, and was living at the time the will was made. It is to be presumed that the testator knew her, because she was his grandchild, and one of the objects of his bounty; and in describing her as the oldest child of Mrs. Butler she is designated with as much certainty as if she had been named in the will. The testator meant that the fund should be divided when she came to be of full age. And if she should die before she arrives at that age, the case of *Batsford v. Kebbell*, (2 Ves. jun. 362,) is a strong authority to show that the legacy to all the children must fail; not because the absolute ownership of the fund is illegally suspended, but because the contingency upon which their title depends can never happen. There is no gift to the children of Mrs. Butler, except in the direction to divide and pay over to them; and the division and payment is to be made only when Eliza becomes twenty-one years of age, and among the children only who may then be living. This, in my opinion, being the true construction of the will, the absolute ownership depends on Eliza's life. If she lives until she attains full age, the legacy will vest in her and the other children then existing, and there will be no longer any suspension of ownership. If she dies under that age, the legacy to the children must fail; and in that event the ownership becomes absolute.

It is not necessary to determine, on this bill, who will, in that case, become entitled. But I do not perceive how Mrs. Butler, the complainant, can take it by force of the third codicil. The bequest to her which is contained therein is expressly revoked by the fourth codicil. Part of the fund bequeathed to Mrs. Butler by the third codicil, by the fourth is given to Mrs. Arden, and the income of the residue is given to Mrs. Butler until her oldest child becomes of age. The legacy to the children, by the fourth codicil, is only a part of what was given to their

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mother by the third. And I do not perceive how the failure of that legacy can revive the bequest contained in the third codicil; which was expressly revoked by the fourth.

*H. W. Warner*, for the appellant. The limitation to the children by the fourth codicil is contingent. And the contingency of 'the eldest child' coming of age, is not to be restricted to El-za, but may be satisfied by that event happening to any child within the terms of the description. There is therefore a possible suspension of the ownership during the continuance of more lives than the statute allows. And the fourth codicil failing for illegality, its revocation of the third codicil is a nullity.

*W. H. Bell*, for the respondents. The fourth codicil does not bring the case within the statute prohibiting perpetuities. (2 R. S. 718, §§ 13 to 16. *Id.* 761, §§ 1, 2. *Bulkley v. Depyster*, 26 Wend. 25. *Patterson v. Ellis, ex'r*, 11 *Idem*, 259, 265. *Kane v. Gott*, 24 *Id.* 661, 2, 3.) For the devise to the children vested in the children who were in esse at the death of the testator; distribution being only postponed until the oldest child then living should have arrived at the age of twenty-one years. (*Hayward v. Whitty*, 1 Burr. 228, 232, 233, 234.) Where an absolute property is given, and a particular interest given in the mean time, as until the devisee shall arrive of age, &c. "and when &c." "then to him, &c." the rule is that it shall not operate as a condition precedent; but as a description of the time when the remainderman is to take possession. (*Moore v. Lyons*, 25 Wend. 134. *Edwards v. Symons*, 6 Taunt. 213. *Hone's ex'rs v. Van Schaick*, 20 Wend. 567. *Bogert v. Hertell*, 4 Hill, 500, 503.)

THE CHANCELLOR. The fair construction of the fourth codicil is, that the testator referred, therein, to the eldest child of the complainant at the time of making such codicil, as the one upon whose arrival at the age of twenty-one, the complainant's estate or income in the profits of that fourth of the testator's property should terminate; and not the eldest child

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which she might have who should attain the age of twenty-one. For in the last case the power of alienation might be suspended for more than two lives in being at the death of the testator, before the contingency would happen by which the estate in remainder would vest in interest. And in the construction of wills, if the language of the testator is such that it may be construed in two different senses, one of which would render the disposition made of his property illegal and void, and the other would render it valid, the court should give that construction to his language which will make the disposition of his property effectual.<sup>(a)</sup> In this case, therefore, the fourth codicil should be construed as if the testator had directed the trustee to pay the income of the fund to the complainant until her oldest child then in existence, or who should be in existence at his death, should arrive at the age of twenty-one years, or until the time when such child would arrive at the age of twenty-one years, if she lived to attain her majority; and in case such eldest child lived to attain her majority, then that this one-fourth of the estate should be divided into as many shares as there were children of the complainant then living, and that one share should belong to each, payable when they respectively arrived at the age of twenty-one; the income in the meantime to be accumulated for the benefit of such of them as were minors. This would give to each child living when the oldest, in existence at the death of the testator, arrived at the age of twenty-one, an absolute interest in his or her share; and would be perfectly consistent with the language which the testator has actually used in his will.

It is true the remainder to the children is a contingent remainder, and is limited on a term of years. For the estate of the mother in the income of the fund, which is to endure until the time when her eldest child Eliza Butler will attain the age of twenty-one, if she lives so long, is an estate in the fund for a term of years; that is, for the term of twelve years, or a little less, from the death of the testator. But a contingent remain

(a) *Mason v. Jones*, 2 Barb. Sup. Court Rep. 244.



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dei may be limited upon a term of years, provided the nature of the contingency on which it is limited is such that the remainder must vest in interest, if ever, during the continuance of not more than two lives in being at the time of the creation of such remainder, or at the termination of not more than two lives thus in being. (1 R. S. 724, § 20.) Here the contingent remainder is so limited that it must vest in interest, if ever, during the continuance of one life in being at the death of the testator; which, in a will, is to be deemed the time of the creation of the estate. For the contingent remainder, to the eldest child of Mrs. Butler at the death of the testator, and to the other children who are to share in the ultimate remainder in fee of this fourth of the testator's estate upon the happening of the contingency contemplated by him in his will, is so limited that it must take effect, if ever, during the continuance of the life of such eldest child. The absolute ownership of the fund, therefore, could not be suspended by this contingent limitation, beyond the continuance of two lives in being at the death of the testator. For, if the giving of the rents and profits to the complainant until her eldest child should attain the age of twenty-one years, would have the effect to suspend the absolute ownership of the property beyond her own life and the life of the eldest child, in case such eldest child died before arriving at the age of twenty-one years, the limitation to the complainant, instead of the contingent limitation to her children, would be the void limitation.

It is understood that Eliza, the eldest child of the complainant who was in esse at the death of the testator, actually lived to attain the age of twenty-one years in May, 1846. If so, the contingency contemplated by the testator then occurred; and the children of the complainant who were then living became the absolute owners of the whole of the fund in controversy, upon the happening of that event. It is therefore unnecessary to inquire who would have been entitled if Eliza Butler had died under the age of twenty-one. It is sufficient to say, none of the respondents in this case had any interest in that question when the bill in this cause was filed. Nor were the proper

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parties before the court to authorize a decree giving a construction of the will in reference to such a contingency.

There was, therefore, no error in the decree of the vice chancellor; and it must be affirmed, with costs.

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WISWALL and others vs. WANDELL.

Notice of an application to the court for a license to establish a ferry, need not be given to all who claim a right to the ferry; nor even to all those who have obtained a license from another court for a ferry at the same place. All that is required, where the applicant is not the owner of the land through which the highway adjoining to the ferry runs, is that the person applying for a license shall give notice of the application, to the owners of such land.

Where a bill was filed, by persons claiming the exclusive right to a ferry, to obtain a decree restraining the defendant from keeping a ferry at the same place, and such bill alleged that the defendant had established a ferry there, in violation of the rights of the complainants; and that he was using the same in pursuance of a pretended license from some court or person, but that if any license had been granted to the defendant, the same was granted in fraud of the complainants' rights, *and without any legal notice to them*; but such bill contained no allegation that the complainants were the owners of the land through which the road adjoining the ferry ran; *Held* that the averment, as to the want of notice to the complainants, was not material for any of the purposes of the suit; and that the defendant was not bound to answer it.

THIS case came before the chancellor upon an appeal from an order of the vice chancellor of the third circuit, overruling the defendant's exception to the master's report, upon an exception to the answer for insufficiency. The bill was filed to obtain a decree restraining the defendant from using a skiff ferry for the conveyance of passengers across the Hudson river at Troy. The bill alleged, in substance, that on the 10th of May, 1796, Jacob D. Vanderheyden was the owner of all the lands on the east bank of the Hudson river between the south bounds of Division-street, on the south, and the north bounds of Grand Division-street, on the north, and bounded west by the river;

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that, as appurtenant to such lands *or otherwise*, he was the owner of and enjoyed the exclusive right of ferriage, across the river, opposite such lands; that on the day last mentioned, he conveyed to the trustees of the then village of Troy certain portions of those lands for streets running to the east bank of the river, upon condition that the trustees should not erect, establish, or carry on, any ferry from Troy to the opposite bank of the river; and reserving to him and his heirs and assigns the privilege of using and erecting a ferry on such lands, in as full and ample a manner as if that conveyance had not been made; that the right of ferriage so reserved became vested in the complainants, by divers devises, descents, and conveyances, from and under Jacob D. Vanderheyden, together with lot No. 8, south of and adjoining Ferry-street; that in April, 1843, one of the complainants, for the joint benefit of himself and the others, obtained a license, from the court of common pleas of the county of Albany, to keep a ferry between the foot of Ferry-street and the village of West Troy, and a skiff ferry from the foot of State-street to the same village, for three years. The bill, which was filed the last of October, 1845, then charged, that the defendant had established a skiff ferry and had commenced the ferriage of passengers, across the river, from the foot of State-street, in the city of Troy, to the opposite side of the river, in violation of the right of the complainants; that he pretended he had procured a license, from some court or person, to establish and keep a ferry there; whereas the complainants charged that if any license had been granted to him by any court, the same was granted to and procured by him in fraud of the complainants' rights, *and without any legal notice to them or either of them*, and in violation of the statute on that subject; and that such license was illegal and void.

The defendant, by his answer, denied that Jacob D. Vanderheyden, by virtue of his ownership of the lands or otherwise, was entitled to the exclusive right of ferriage claimed by him, or that the complainants had derived any such right from him. The defendant also denied that the skiff ferry established by the complainants, and for which they had a license from the

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court of common pleas of the county of Albany, was from the foot of State-street in Troy. He also stated, in his answer, that, on the 3d of October, 1845, he was duly licensed by the court of common pleas, of the county of Rensselaer, to keep a skiff ferry, for the transportation of foot passengers, from the foot of State-street in the city of Troy to the opposite bank of the river, for the term of one year; setting out the recognizance entered into by him, and the rates of ferriage which he was authorized to receive. He further stated that State-street was a public highway, and that the owners of all the land adjoining the same, where his skiff ferry was established, were unwilling to apply for a license to run any ferry therefrom, and were willing and desirous that he should run his ferry therefrom in pursuance of his license. But the answer neither admitted nor denied the charge in the bill, that the license was obtained without giving to the complainants or either of them, any notice of the application to the court for such license. And the complainants excepted to the answer, for insufficiency, on that account. The master allowed the exception; and the defendant having excepted to the report, the vice chancellor sustained the decision of the master and overruled the exception to the report.

*J. D. Willard*, for the appellants.

*S. Stevens*, for the respondents.

THE CHANCELLOR. It is admitted that the defendant has not answered the allegation, in the bill, that the license to the defendant, for the skiff ferry, was granted and procured without any notice to either of the complainants. The only question for consideration, therefore, is whether there is any thing in the bill showing that allegation to be material for any of the purposes of the suit. For if notice of the application was not necessary to be given, to the complainants, to render the granting of the license valid, the allegation that it was granted in fraud

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and derogation of their rights, is sufficiently denied in the answer.

The title of the revised statutes for the regulation of ferries, does not require a notice of the application for a license to be given to all who claim a right to the ferry, nor even to all those who have obtained a license from another court, for a ferry at the same place. All that is required, where the applicant is not the owner of the land through which the highway adjoining to the ferry runs, is that the applicant shall give notice of the application to the owner of such land. Here there is no allegation in the bill that the complainants were the owners of the lands through which the road adjoining the skiff ferry runs, or any part of such lands. The grant from Lansing, to Cushman and Wiswall, in connection with the north half of lot No. 8, was of the exclusive right which the grantor claimed to keep a ferry. But he did not grant to them the right to go over any other of his lands, for the purpose of enabling them to establish a ferry opposite to such lands.

If the complainants are right in charging that they have the prescriptive and exclusive right to the ferry, independent of their license from the court of common pleas of Albany county, then the license to the defendant is good for nothing; and it is wholly immaterial whether the complainants had or had not notice of the application for it. But if their right depends upon their license exclusively, then they were only entitled to the notice in case they were owners of the lands through which the road to the skiff ferry runs. And I find nothing in this bill from which it can be inferred that the complainants were such owners, at the time the license to the defendant was granted. The statute requiring notice, of the application for a ferry license, to be given to the owner of the lands through which the highway adjoining the ferry runs, is probably based upon the supposition that such owner is in fact the owner of the fee of the land over which the highway is laid out. And such is the legal presumption in the present case, in the absence of any evidence that the land over which State-street is laid out belongs to the complainants, or to the city of Troy.

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The Bank of Orleans v. Flagg

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The charge in the bill, of a want of notice to the complainants, not appearing to be material for any purpose of the suit, the master erred in allowing the exception to the answer for insufficiency, and the exception to his report was well taken. The order appealed from was therefore erroneous, and must be reversed, with costs. And an order must be entered allowing the exception to the master's report, and overruling the exception to the answer; with costs, to the defendant, upon the reference, and also on the exception to the report, and on the hearing before the vice chancellor.

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THE BANK OF ORLEANS vs. FLAGG and others.

[Criticism, 23 Hun 137.]

Where a person executes a mortgage upon premises which he has previously contracted to sell to another, and the mortgagees file a bill to foreclose such mortgage, making the purchaser a party thereto, if they mean to insist that they are entitled to a preference over such purchaser, as bona fide mortgagees without notice, the bill should state that such purchaser claims an interest under a contract, or a pretended contract, to purchase, prior to the mortgage; and it should also allege that if he had any such interest the complainants had no notice thereof at the time they took their mortgage. And the bill should show the other facts which are necessary to entitle the complainants to protection as bona fide purchasers.

Where a purchaser of premises is in the actual possession thereof, by his tenant, at the time of the giving a mortgage thereon to others, by the vendor, such possession is constructive notice to the mortgagees, of the equitable rights of such purchaser; and they are not entitled to protection as bona fide mortgagees without notice of his rights.

THIS was an appeal by N. A. Graves, one of the defendants in this cause, from a decree of the vice chancellor of the eighth circuit. The facts of the case, as they appeared upon the pleadings and proofs, were as follows: James M. Flagg was the owner of a house and lot in the village of Albion, Orleans county, which he had leased to N. Bedell for a year, to commence on the first of May, 1842. On the 18th of April, 1842, Flagg entered into an agreement, in writing, to sell the prem-

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ises to Graves for \$1150; of which \$100 was paid at the execution of the agreement, and the residue was to be paid in quarter-yearly instalments. of \$50 each, with annual interest. The first two quarterly payments were to be secured by notes, upon the execution of the deed, and the other instalments by a mortgage upon the premises. On the same day that the agreement was executed, Flagg assigned to Graves the lease or rather, the counter agreement of Bedell, the lessee, for the payment of the rent of the premises. And on the 22d of April Bedell went into possession, under Graves, and was in possession as his tenant from that day, and at the time of the giving of the mortgage, to the complainants, hereafter mentioned.

On the 3d of May, 1842, Flagg mortgaged the premises to the Bank of Orleans, to secure the payment of his note of the same date, for \$1100, payable in three months, and such note or notes as might be given in renewal thereof. This note not having been paid at the time it became payable, the complainants filed their bill against James M. Flagg and wife in August, 1842, and making Graves and Bedell also defendants in the suit; the bill merely stating in reference to their interest in the premises, that they had, or claimed some interest in the mortgaged property, or in some part thereof, as purchasers, mortgagees, or otherwise, which interests, if any, had accrued subsequent to the lien of the complainants' mortgage, and were subject thereto. The bill was taken as confessed against Flagg and wife and Bedell. Graves put in his answer, denying that he claimed an interest in the premises subsequent to the lien of the mortgage, or subject thereto, but setting up his agreement with Flagg for the purchase of the property, the payment of a part of the consideration money, the assignment of the interest of Flagg under the lease, and the possession of the premises by Bedell, as Graves' tenant, at the time of the execution of the complainants' mortgage. The cause was heard upon pleadings and proofs, as to Graves, and upon the bill taken as confessed against the other defendants; and upon the master's report as to the amount due on the mortgage, the amount then due upon the contract of sale and purchase between Flagg and

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Graves, of the 18th of April, 1842, and the amounts which would subsequently become due thereon.

The vice chancellor made a decree for the sale of the mortgaged premises, and for the payment of the whole of the complainant's debt and costs out of the proceeds of the sale. But such decree contained a provision that if the defendant, Graves, should pay the amount which had already become due upon his contract before the sale, and should thereafter pay the instalments as they became due, then the premises should not be sold, but the complainants should pay the costs of Graves.

*A. Taber*, for the appellant.

*H. R. Selden*, for the respondent.

THE CHANCELLOR. The bill in this cause was not properly framed to enable the complainants to litigate the question whether they were entitled to a preference over the contract of Graves, as bona fide mortgagees, without notice of his rights. To enable them to litigate that question, instead of alleging, falsely, that he had or claimed some interest in the premises, which had accrued subsequent to their mortgage, the bill should have stated that he claimed an interest under a contract or a pretended contract to purchase, prior to the mortgage. And then the complainants should have alleged that if he had any such interest they had no notice thereof at the time they took their mortgage, and they should also have stated the necessary facts to entitle them to protection as bona fide purchasers. The bill, therefore, ought to have been dismissed as to Graves, even if the complainants had made the necessary proofs to show that they were bona fide mortgagees without notice.

But in this case they were not entitled to protection as bona fide mortgagees without notice. For the evidence clearly shows that at the time of the giving of the mortgage, Graves was in possession of the premises by his tenant; who had been put in actual possession of the house and lot, by Graves, prior to the date of the mortgage. This, in equity, was constructive notice



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The Bank of Orleans v. Flagg.

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of the rights of Graves ; and if the officers of the bank had made the proper inquiries of the tenant in possession, they would, necessarily, have been led to the knowledge of the fact that Graves had, or claimed, some interest in the premises.

The decree is clearly erroneous as to the appellant, as it compels him to make the payments under his contract, without getting the title to the premises which he contracted for, or to lose, not only his costs of defending this suit, but all interest under the contract. After he shall have made all the payments under the contract, he may be subjected to great trouble and expense, and perhaps of a chancery suit with an insolvent, to obtain title to the premises. By the terms of the contract Graves was entitled to a warranty deed of the premises, free from incumbrances, before he was bound to pay, or secure the payment of the residue of the purchase money of the premises. The proper course for the complainants, instead of making Graves a defendant, and making a false charge against him as having acquired an interest in the premises subsequent to their mortgage, would have been to give him notice of their rights, as mortgagees, to the unpaid purchase money upon the contract, so that he might not pay it to Flagg ; and then, to file his bill against Flagg and his wife, alone, to foreclose the mortgage. The purchaser, upon a sale under the decree in such a suit, would have acquired the legal title to the land, and all the right which Flagg before had to the unpaid purchase money. Such purchaser under the decree would then have been in a situation to give a good title to the premises, and could have compelled Graves specifically to perform the contract which he had made with Flagg. Or he might have ejected Graves from the premises, if he refused to comply with the terms of the contract on his part.

The same decree, in substance, could and ought to have been made, upon this bill ; so as to protect the legal and equitable rights of both parties. The decree appealed from must therefore be reversed, with costs, so far as it affects the rights of Graves under his contract ; and the bill must be dismissed, as to him, with costs. The decree must direct a foreclosure

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Hoyt v. Mackenzie.

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and sale of all the interest of the other defendants who have suffered the bill to be taken as confessed; with the usual decree over against Flagg for the deficiency, if any. The decree must also declare that the dismissal of the bill shall be without prejudice to the rights of the complainants, or the purchaser under the decree, as against the other defendants, to demand and compel a specific performance of the contract of the 18th of April, 1842, by the defendant Graves, or any person claiming the premises under him; or to bring any suit, either at law or equity, or under the code of procedure, for relief, upon giving or offering to give to him a good and unincumbered title to the premises, with covenants of warranty, as specified in such contract.

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## Hoyt vs. MACKENZIE and others.

[Criticism, 4 Duer 379, 389.]

At common law, the author of a book, or other literary production, whether in the shape of letters or otherwise, has a right of property therein, until it has been published with his assent; and he may maintain an action for his damages arising from a surreptitious publication thereof.

And a court of equity will, by injunction, restrain the publication of letters written by the complainant, if they are of any value to him as literary productions; or if his right to multiply copies thereof is of any value to him.

*Aliter*, however, in relation to letters written to the complainant by other persons, without any authority, express or implied, being given to him to publish them.

A letter cannot be considered of value to the author, for the purpose of publication, which he would not willingly consent to have published.

A court of equity cannot properly exercise the power to restrain the publication of private letters, on the ground of protecting literary property, where they possess no attribute of literary composition.

A court of equity has no jurisdiction to restrain or punish crime, or to enforce the performance of a moral duty, except so far as the same is connected with the rights of property.

Although it may be evident that the publication of private letters is with the view of wounding the feelings of individuals, or of gratifying a perverted public taste, a court of equity has no jurisdiction to restrain their publication, when they are of no value as literary property.

*Welmore v. Scovel*, (3 *Edw. Ch. Rep.* 515,) approved of.

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THIS was an appeal from an order of the vice chancellor of the first circuit, denying the application of W. Taylor, one of the defendants in this cause, to dissolve an injunction. The bill stated, among other things, that the complainant, in May, 1844, was in possession of, as his own property, certain letters composed by him and addressed to other persons named in the bill, copies of which letters were contained in a printed pamphlet annexed to the bill as a schedule; that at the same time he was in possession of other letters addressed to him in the way of private correspondence, by certain individuals named, and by other persons, copies of portions of which letters were also contained in the printed pamphlet; which last mentioned letters were the compositions of the several persons by whom they purported to have been written; that the writers of the letters, respectively, had the sole and exclusive right of making and multiplying copies thereof, and of printing and publishing the same; that the complainant had the right to the possession of such letters and their contents, and had a special property therein as the bailee of the writers thereof respectively; that the defendants W. L. Mackenzie and C. S. Bogardus, or one of them, surreptitiously and fraudulently obtained possession of such letters, by breaking open a chest in the custom house in which the complainant had deposited them for safe keeping, under lock and key, as the complainant believed and charged; that having so possessed themselves of the letters, they used them for the purpose of making up the pamphlet annexed to the bill in this suit, and procured the pamphlet to be stereotyped, printed and published, and numerous copies thereof to be sold; and that they and the other defendants, some of whom were their associates and others were their agents, had other printed copies on hand for sale, and that they intended to print and publish copies thereof to an indefinite extent, and to sell the same; that the defendants also intended to print and publish and offer for sale others of the letters so purloined or surreptitiously obtained; that some of the defendants, and particularly W. Taylor, the appellant, a vendor of books in New-York, had sold several copies of the pamphlet, as the agent of, and on commission for, Mackenzie, and others of the defen-

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dants, as the publishers, and had received and still held large sums of money as the proceeds of such sales. The complainant also alleged, in his bill, that the letters surreptitiously obtained from him and printed in the pamphlet constituted its chief value, and that the several portions of the pamphlet exclusive of the letters had no literary or other value than as connecting the letters together. And he insisted that the publication of the letters composed and written by him, was in violation of his right of property therein as author, and of his exclusive right to print and publish the same and to make and multiply copies thereof; and that the publication of the letters addressed to, and received by him, was in violation of the right of property of the writers of such letters, as the authors, who had the exclusive right to make and multiply copies thereof; and was also a violation of his special property in such letters as the bailee of the writers and authors; and that he was entitled to the aid of the court to restrain the further publication of all the letters contained in the pamphlet, and the publication of those not contained therein, and to call for an account of the profits and proceeds of the publication and sale already made. The prayer of the bill was therefore framed accordingly.

Upon the filing of the bill an *ex parte* injunction was obtained, restraining the defendants, and their agents, from printing or publishing, or in any manner disseminating, or parting with, the original letters, or copies thereof, or printing, publishing, selling, or offering for sale, or disposing of, the pamphlet, or the stereotype plates of the same, or parting with or paying over any part of the proceeds of the sale of the pamphlet, other than to the complainant.

*M. G. Harrington*, for the appellant.

*W. M. Evarts*, for the respondent.

THE CHANCELLOR. I have no doubt that by the principles of the common law the author of a book or other literary production, whether in the shape of letters or otherwise, has a right

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of property therein ; at least until it has been published with his assent. The case of *Webb v. Rose*, decided by Sir Peter Jekyll in 1732, where the clerk of a deceased conveyancer was restrained from printing the decedent's drafts, was based upon that principle. This was followed by the decision of Lord Hardwicke, in the case of *Pope v. Curl*, (2 *Atlc. Rep.* 342,) in 1741, where the defendant was restrained by injunction from publishing Pope's letters to Dean Swift ; and by the decision in the case of *Forrester v. Waller*, a few days previous, where the defendant was restrained from publishing the complainant's notes which had been surreptitiously obtained. Lord Northington also, in the case of *The Duke of Queensbury v. Shebbeare*, (2 *Eden's Rep.* 329,) which came before the court of chancery in England in 1758, refused to dissolve an injunction which restrained the printing of an unpublished manuscript history of the reign of Charles the second, by Lord Clarendon ; a copy of which manuscript had been taken by permission of the personal representative of the author, and which the person receiving the same had sold to the defendant for publication, without authority. Indeed it appears to have been conceded by the counsel, as well as by all the judges, in the case of *Millar v. Taylor*, (4 *Burr. Rep.* 2303,) that by the common law an author was entitled to the exclusive right to print his own literary productions, until they had been once printed and published by his authority ; and could maintain an action for the damages which he might sustain by their being surreptitiously printed by others. And Mr. Justice Yates only differed in opinion with Lord Mansfield and the other judges of the court of king's bench, in that case, upon the question whether an author did not lose his exclusive right, by printing and publishing his work himself ; except so far as his right to the copy was protected by the statute on that subject. It is true, when the question as to the rights of an author afterwards came before the house of lords, one of the twelve judges of England thought the author had no exclusive right to his unpublished work, at the common law ; and two others thought he could not maintain an action at the common law against any person who printed and published his literary pro

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duction without his consent, unless such person obtained the copy by fraud or violence.

The decisions to which I have referred settle the law on the subject in England. And as they were all made before the separation of the colonies from the mother country, I consider them as binding upon this court. I should therefore affirm the decision of the vice chancellor, so far as relates to the three letters written by the complainant himself, if those letters were in fact of any value to him as literary productions, or if his right to multiply copies thereof was worth any thing to him. In relation to the letters written to him by other persons, however, if those letters were of any value to the authors, as literary productions, or for publication, the cases of *Pope v. Curl*, before referred to, and of *Thompson v. Stanhope*, (*Amb. Rep.* 737,) show that the right belonged to them, and not to the complainant; who received their letters without any authority express or implied to publish them.

It is evident, however, in relation to all of these letters, that the complainant never could have considered them as of any value whatever as literary productions. For a letter cannot be considered of value to the author, for the purpose of publication, which he never would consent to have published; either with or without the privilege of copy right. It would therefore be a perversion of a correct legal principle, to attempt to restrain the publication of these letters, upon the ground that the writers thereof had an interest in them as literary property. No one, it is true, whose moral sense is not depraved, can justify the purloining of private letters, and publishing them for the purpose of wounding the feelings of individuals, or of gratifying a perverted public taste. And it is hardly possible that any one who has been connected with the publication and sale of the pamphlet annexed to the complainant's bill, could for a moment have supposed that these letters were honestly obtained, for publication; or that they were published with the approbation of the writers thereof, or of the complainant to whom most of them were directed. But this court has no jurisdiction to restrain and punish crime, or to enforce the performance of moral duties, except so far as

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they are connected with the rights of property. The vice chancellor, in the case of *Wetmore v. Scovel*, (3 *Edw Ch. Rep.* 515,) very correctly decided that the court of chancery could not properly exercise a power to restrain the publication of private letters, on the ground of protecting literary property, where they possessed no attribute of literary composition. And upon that principle the application of the appellant should have been granted in this case. The order appealed from must therefore be reversed; and the injunction so far as it affects the rights of the appellant, must be dissolved.

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## LANSING and others vs. RUSSELL and others.

The certificate of the clerk of a court is not evidence of the existence of a judgment, except in those cases where it is made evidence by statute.

Independent of any statutory provision, the proper way to prove the existence of a judgment is by the production of the record itself, or of an exemplification thereof, or of a sworn copy of such record.

In what cases the testimony of experts is proper, upon the trial of an issue as to the genuineness of the grantor's signature to a deed; and what credit such testimony is entitled to.

Where the verdict of the jury, upon the trial of issues sent to a court of law to be tried, is against the weight of evidence, a new trial will be granted by the court directing the trial.

Issues were awarded, to try the question as to the genuineness of a grantor's signature to two deeds, one to his daughter and another to his son-in-law, and as to the competency of the grantor to execute such deeds; and the jury having found in favor of the validity of both deeds, a motion was made for a new trial; upon which motion it appeared that it was the grantor's intention to make the shares of all his children in his estate equal. And the deed to his daughter professing to have been given with the view of putting her upon an equality with his other children, and the court being satisfied, from the evidence, that the grantor could not have understood the effect of that deed upon the division of his property, and the grantees having failed to prove that equality among the grantor's children would be produced by allowing both deeds to stand, a new trial of the issues was ordered, so far as they related to the deed to the grantor's daughter.

The testimony of experts, who have been in the habit of examining the marks and signatures of aged, as well as of middle aged and of young persons, for the purpose

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of determining the genuineness of such marks and signatures, is proper ; to show that the mark to an instrument alleged to be a forgery, could not have been the genuine mark of a very aged man, but was a simulated mark.

THIS was an application by the complainants for a new trial of the issues awarded in this cause by the court of chancery. The object of the complainant's bill was to set aside two conveyances executed by C. Lansing, a short time previous to his death ; on the ground that they were obtained from him by fraud, or that they were in fact never executed by him. C. Lansing died in 1842, in the 90th year of his age. The deeds purported to be executed by him on the 30th of November previous, and were witnessed by W. A. Russell, a son of the grantees in the respective deeds. One of the deeds was to D. Russell, the son-in-law of the grantor and conveyed a valuable farm in the town of Salem, Washington county. The other was to Mrs. Russell, the daughter of the grantor, and was for his homestead at Lansingburg, and reserved to the grantor a life estate therein.

The Salem farm had formerly belonged to D. Russell, and he was residing on it with his family at the time of the date of the conveyance thereof to him, in November, 1841. In October, 1820, Russell had conveyed the Salem farm to his father-in-law, by a deed which upon its face was absolute ; and which purported to have been given for the consideration of \$10,600 paid by the grantee therein. The defendant, Russell, however, alleged that it was in fact given merely as a security, to his father-in-law, for moneys which the latter was to advance, and for responsibilities which he had agreed to assume to and for him, the grantor ; and that it was agreed between them that whenever the amount of such advances and responsibilities, with interest, should be repaid or discharged by Russell, his father-in-law should reconvey the premises to him. Russell also alleged, in his answer to the bill in this cause, that subsequent to the giving of the deed of 1820, as such security, he paid to his father-in-law large sums of money, and transferred to him bonds and mortgages and other property in payment of such advances and responsibilities, previous to the autumn of



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1837, to nearly the whole amount thereof; that the parties then accounted together as to such advances and payments, when it was found that there was about \$500 due to C. Lansing on account of his advances and responsibilities, including interest; which amount was, either then or immediately afterwards, paid to him; and that he then promised to reconvey the farm at any time, when he should be requested to do so. And the defendant Russell alleged that the conveyance of the Salem farm in November, 1841, was made in conformity with that promise, and to carry into effect the original agreement of October, 1820, that the farm should only be held as security, and should be reconveyed upon payment of the advances made to the grantor therein.

The deed to Mrs. Russell, of her father's homestead, purported to have been made in consideration of natural love and affection, and to place her upon terms of equality with the other children of the grantor. It also contained covenants of warranty, and a special provision that if the covenants were broken Mrs. Russell and her heirs and assigns were to be entitled to the sum of \$10,000 as liquidated damages, "thereby making her share of the property of the said Cornelius Lansing, equal in amount to the individual shares of his other children."

The deeds of November, 1841, were not subscribed with the name of the grantor, but purported to have been executed by him by making his mark, or cross, opposite the seal. The bill alleged that at the time those deeds purported to have been executed by C. Lansing, he had no power, either of body or of mind to transact business, or to hear or comprehend the contents of the papers, if they were read to him; that the marks affixed to the deeds were not made by him, or if made by his hand it was by *compulsion*, and by his hand being held and guided by D. Russell, or some other person, by mere contrivance, and without the voluntary act or consent of C. Lansing. In reply to this part of the bill, the answer, which was not on oath, denied the incompetency of the grantor to make the conveyances, at the time they purported to have been executed, or that they were not the voluntary and rational act of the grantor; and it

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also denied that his hand was guided by the defendant, or by any other person, or that the execution thereof was procured or obtained by compulsion, or by any fraudulent management or imposition, as charged in the bill.

The following issues were awarded, for the settlement of the matters of fact in dispute in the cause, and were tried before Judge Ruggles, at the Dutchess circuit, in November, 1845 :

1. Was Cornelius Lansing legally incompetent, by reason of unsoundness of mind, or mental incapacity, to execute a deed at the time when the two deeds of November, 1841, were obtained, or when either of them was obtained ?

2. Were the deeds of November, 1841, falsely made, forged and counterfeited ; or was either of them falsely made, forged and counterfeited ?

3. Were the signatures and marks purporting to be made to those deeds, by C. Lansing, or the signature or mark to either of the deeds, procured and obtained by compulsion, or by the fraudulent management and imposition of D. Russell and his wife, or of either of them, or of any other person by the procurement of Russell and his wife, or of one of them ?

The complainants gave in evidence the will of C. Lansing, made in September, 1836, and a codicil to the same dated the 10th of July thereafter ; both of which were admitted to probate in May, 1842, as valid testamentary dispositions of the testator's real and personal estate. By the will the testator gave to his son, A. C. Lansing, the income of one eighth of his real and personal estate ; the one half for his own use, and the other half in trust, to receive such income for his children, born and to be born, share and share alike, and to their heirs ; to be paid to those who were of age at the death of the testator, one year thereafter, and to the others as they respectively arrived at the age of twenty-one ; with the accumulations thereof. And the remainder in that eighth of his estate he gave to his son, A. C. Lansing, in trust, to convey, pay and deliver over to his children the one half part thereof when they should be of the age of twenty-one respectively, or within one year after the death of the testator, and the other half thereof to the children of A. C.

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Lansing, born and to be born, share and share alike, after the termination of his life estate therein. He gave a similar interest in all respects, in another eighth of his estate, to his son D. C. Lansing, and his family; and a similar interest to his son J. C. Lansing, except that as to the last he vested the title in his executors as trustees, instead of vesting it in the son, for the benefit of himself and his children.

One other eighth he gave to or for the use of the children or descendants of his deceased daughter, formerly the wife of D. Allen, deceased. One other eighth to the surviving husband of his deceased daughter Helen Alvord, the income of one half for the use of himself for life, and the income of the other half and the remainder in fee in the whole, in trust for the children of Mrs. Alvord. Another eighth he gave to his son-in-law G. Tracy, in trust, as to the income of the one half for himself and his wife during their joint lives, and for the survivor during life; and as to the income of the other half, and the remainder in the whole, in trust for the children of Mrs. Tracy, as they arrived at the age of twenty-one respectively. He gave another eighth to his son-in-law A. Seymour, under similar limitations in all respects. The remaining one eighth he gave to his executors, and the survivor of them, in trust, to pay over one half of the income to his daughter, Mrs. Russell, during her life, and if her husband survived her, then to pay over that half of the income to him for life; and as to the other half of the income, and the remainder in fee in the whole eighth, in trust for the children of Mrs. Russell. The testator also directed his executors to retain out of the share of J. C. Lansing and his children \$6000, and out of the share of Mrs. Russell and her children \$10,000, to be in the hands of his executors as a part of the testator's personal estate. He also directed that his son D. C. Lansing should pay to the executors \$1050, and that his son-in-law G. Tracy should pay to the executors \$1740; which sums were charged upon the shares devised to them and their children. And he made his three sons, and his four sons-in-law then living, and two other persons, the executors of his will.

Among other witnesses on the part of the complainants, J

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Van Schoonhoven was called, and testified that in the summer or fall of 1841, he went to C. Lansing, at the request of D. Russell, for the purpose of inducing him to make a reconveyance of the Salem farm. The witness stated to C. Lansing that he called at the request of Russell to see if he would not reconvey the Salem property before his death, as it would cause trouble afterwards. He replied, "you know it is all right, I have made it all right, I shall make no change in my property." The deeds in controversy were produced upon the trial, and shown to several witnesses who had been, or then were, cashiers of banks and experts in detecting forgeries and counterfeits, and to one who had been in the habit of seeing papers executed by aged pensioners, by making their marks thereto, as well as by middle aged persons upon applications for naturalization. And such experts all testified that the marks made to these deeds were not the genuine marks of a person of the age of C. Lansing at the time those deeds purported to have been executed. The testimony was objected to by the defendant's counsel, but admitted by the judge. A great many witnesses were then examined on the part of the complainants and of the defendants as to the state of the mental and physical faculties of C. Lansing, and his capacity to make the deeds in question, his declarations as to the holding of the deed of the Salem farm as security for advances made to and responsibilities assumed for Russell, and as to the amount of advances to and of the repayments made by Russell, and as to the accounts between D. Russell and his father-in-law, at different times subsequent to the giving the deed of the Salem farm in 1820, and before the date of the deeds in controversy.

The defendants thereupon called their son W. A. Russell, the subscribing witness to the deeds; who testified, in substance, that he went with his father to the house of his grandfather on the day the deeds were executed, and that his father went into the house while the witness put out his team; that when he went into the room, where his grandfather usually staid, he found him and D. Russell together, sitting by the fire and talking in relation to their business. The first conversa

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tion the witness recollected was that his grandfather asked D. Russell if he had that receipt with him. He said he had, and produced it, and it was read. This receipt, the witness testified he had seen in the hands of his father, in the fall of 1837, that the body of it was in the hand-writing of his grandfather, and it was signed by him; that by it he acknowledged to have received the sum of \$2700, and stated the balance due to be \$500; on receipt of which last mentioned sum he was to reconvey the Salem farm to D. Russell. After the receipt had been read, Mr. Lansing asked D. Russell if he had prepared, or had got, the deeds? The latter said he had, and produced them. Mr. Lansing then requested that they should be read, and Mr. Russell accordingly read the deed which was to be given to Mrs. Russell, and they were then called out to tea; after tea they went back again and the other deed was read. Mr. Lansing then wanted that part of the deed to Mrs. Russell which stated the object of making the deed, to be read over again, and it was done. He then asked if it reserved the use of the house to him during his lifetime, and being told that it did, said "that's right," and moved to the table to execute them. Witness' father then asked Mr. Lansing if he understood them, and he said that he did, "one is a deed to Alida of part of my homestead, and the other is a deed to you of the Salem farm." Mr. Lansing said, "give me the pen and show me where to put it," and then said, "steady my hand, Russell." Witness' father took hold of Mr. Lansing's hand and assisted him to make his mark, first to one of the deeds and then to the other. The witness then asked his grandfather if he acknowledged those deeds to be his hand and seal for the purposes therein mentioned? and being answered in the affirmative, he signed his name to them as a witness. After sitting fifteen or twenty minutes, Mr. Lansing said, "Russell, I want that receipt; I ought to have it, it belongs to me now." Mr. Russell replied, "you may have it if you want it;" and went and got a paper which witness supposed to be the receipt, and delivered it to his grandfather. The next morning, when witness was going away, he went to take leave of his grandfather; who then told him to tell hi

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mother that he had given her a deed of his old place there, and she must come down and stay with him; that he had tried to get his children together to settle their matters, but could not do it, and that it was the only way he had left to do justice to her.

The complainants objected to the giving of parol evidence of the contents of the receipt of 1837; but notice having been given to the complainants to produce it, and D. Russell having testified that it was delivered up to C. Lansing the evening of the execution of the deeds, and that he had not afterwards seen it, the judge decided that parol evidence of its contents was proper. S. Russell, a brother of D. Russell, also testified to having seen the receipt in the hands of his brother as early as 1836; that he then lent his note to his brother David for \$500, which C. Lansing afterwards told him he held. This witness also testified that in December, 1841, or January, 1842, he called to see Mr. Lansing, and was told by him that he need not give himself any trouble about the note, for his brother had paid it; and that he had deeded to him the Salem farm and settled all his affairs with him, and had given Mrs. Russell a part of the place on which he, C. Lansing, lived. A witness was then called on the part of the complainants to show that this last conversation could not have occurred at the time stated by S. Russell. The testimony of the subscribing witness to the deeds was also contradicted in some particulars. In the course of the trial, the complainants, for the purpose of proving the state of the accounts between D. Russell and his father-in-law, offered in evidence a statement in the hand-writing of G. Tracy, one of the complainants; which statement was rejected by the judge. They also offered in evidence a note for \$600, dated in October, 1820, given by C. Lansing to J. Sturges; with a memorandum thereon, in the hand-writing of the former, stating that it was for D. Russell, and was included in the consideration money of the deed for the Salem farm; which evidence was also excluded by the judge. They also, for the purpose of proving that D. Russell was very much embarrassed between the time of giving the original deed to his father-in-

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aw of the Salem farm, and the date of the deeds in question, offered in evidence a certificate of the clerk of the supreme court, that a large number of judgments were rendered against him during that time. That evidence was objected to, and was excluded by the court.

The judge, in his charge to the jury, stated that in relation to the first issue they must decide whether C. Lansing, at the date of the deeds in question, was mentally incapable of executing them. And if they were satisfied he had not mind enough left to enable him to understand the several provisions in the deeds, and to comprehend their meaning, they should find the affirmative of the first issue; if otherwise, in the negative; that the burthen of establishing the incapacity of C. Lansing was upon the complainants. In respect to the question whether the deeds were forgeries, his honor stated that it was a grave charge, not only involving the title to a large property but implicating the characters of one of the defendants, and of his son and brother; that the evidence to sustain such a charge should be strong and satisfactory; that if the evidence left the question in doubt, the former character and standing of D. Russell should have great weight to turn the scale; that the circumstances tending to show the improbability that C. Lansing would have executed these deeds were to be taken into consideration by the jury, but were not conclusive, as he might have changed his mind. In respect to the testimony of the witnesses who gave their opinions as experts, the judge told the jury it was for them to say whether the skill of these witnesses could detect false marks; that in respect to hand-writing, skill could be acquired, although it was not the safest kind of proof; that it was much more difficult, nay, was it not impossible to judge whether a mark was genuine or simulated? Could any skill enable a witness to distinguish between the mark of an old and that of a young man, and was it safe to rely upon such opinions? He said a mark had not, and could not have any fixed character; that Mr. Lansing was old, blind, and infirm, and no two marks of his were alike; that such evidence was the slightest he had ever known to show forgery; that the

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answer of D. Russell was relied on by the complainants in which he stated that he did not guide Mr. Lansing's hand; although it was now proved by his son that he did guide it. In commenting on this the judge remarked that the answer was in response to a charge, in the bill, that the hand of C. Lansing was *forcibly guided*; that it was not the vital question in the case. His honor also told the jury that to establish a forgery they must discredit the testimony of the son and of the brother of D. Russell; and that it was for the jury to say whether the circumstances relied on to discredit their testimony were material; that, certainly, there were very extraordinary circumstances attending the execution of the deeds; the property conveyed was large, the old gentleman was blind, deaf and very infirm; and it would have been far better for the reputation of the defendant to have had a commissioner, or some third person present, not related to the defendant, to witness the execution; that the defendant and his son were there alone, the deeds were taken away immediately, and the fact of their execution was not made known during the life of the grantor; and it was most extraordinary that the deeds were not made public until more than a year after Mr. Lansing's death. He said these circumstances might properly be taken into consideration by the jury in making up their verdict upon the second question presented for their decision, but that they applied with still more force to the third question.

The judge before whom the issues were tried then directed the attention of the jury to the question embraced in the third issue; whether the signature or mark of C. Lansing to the deeds in controversy, or either of them, were obtained by imposition or fraudulent management? The jury were instructed that in determining this question the capacity of the grantor in the deeds was to be viewed in a different manner from what it was in deciding the first issue; that although a man might not be technically of unsound mind, yet if his intellect was greatly weakened by disease or old age, it was not supposed that he had a mind fully adequate to the transaction of business; and weakness of understanding constituted a material ingredient in



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determining the question whether a deed had been obtained by fraud, imposition, or undue influence; that if it was improbable that such deeds would have been executed by Mr. Lansing in health, and when he was in a situation to take care of his own business, his weak and infirm state at the time they were given afforded strong evidence of fraud. And after recapitulating the leading facts of the case which tended to show that the deed of the homestead to Mrs. Russell, in particular, was inconsistent with the settled determination of her father, in relation to the disposition of his property among his children and descendants, which he had formed when in the full possession of his faculties, his honor concluded by intimating a very strong opinion that the recital in that deed, that the \$10,000, which was to be paid to her as liquidated damages if the title failed, would make her share of her father's property equal in amount to the several shares of his other children, was not true; and that if the deed was correctly read to the grantor he was not in a situation to understand its contents and effect.

*D. Buel & J. Pierson*, for the complainants.

*S. Stevens*, for D. Russell and wife.

THE CHANCELLOR. Upon the questions of law which arose upon the trial of the issues in this case, I do not think there was any error in the decisions of the circuit judge which would justify this court in granting a new trial. The certificate of the clerk of the supreme court was not evidence of the existence of judgments against Russell. It is true, such a certificate is by statute made evidence of a judgment, under the redemption law; and perhaps in some other cases specially provided for. But, independent of any statutory provision, the proper way to prove the existence of a judgment is by the production of the record itself, or an exemplification thereof, or a sworn copy.

The statement of Russell's indebtedness to his father-in-law, made out in the hand-writing of one of the complainants, was properly excluded as evidence against the defendants. There

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was nothing to show that it was made out at the time the Salem farm was conveyed by Russell in 1820, or that it was in existence previous to the controversy between these parties.

Nor was the endorsement or memorandum upon the Sturges note any evidence, as against the defendants, of the fact stated therein. Certainly in a controversy between Russell and his father-in-law, in relation to the amount of the indebtedness of the former, the latter could not make his own memorandum evidence against the adverse party. And if the testator himself could not have used it as evidence, in a suit instituted by himself to set aside these deeds as obtained from him by fraud and imposition, his devisees cannot use it as evidence, in a suit brought by them, for the same purpose, after his death.

I think the judge erred in intimating so strongly to the jury that in his opinion no skill could enable an expert to distinguish between the mark of an old man and that of a young one. And if the decision of this cause turned upon the question whether the marks upon the deeds in controversy were made by the unaided hand of C. Lansing, in the situation in which he is proved to have been in November, 1841, I should feel bound to grant a new trial; upon the ground that these remarks of the judge had misled the jury. I think the testimony of the experts, who had been in the habit of examining signatures and marks of young persons as well as of very aged ones, to prove that the marks to these deeds could not have been the genuine marks of the unaided hand of old age and decrepitude, was properly received, upon the trial, as legal evidence to establish that fact. Those who have seen the genuine signature of the patriot Stephen Hopkins, upon the declaration of our independence, and have compared it with Benjamin O. Tyler's admirable fac simile of the signatures to that instrument, can see at once that the hand of age and disease may be successfully imitated by one in the prime of life and in the full possession of his muscular powers. But the venerable patriot whose head and whose heart were still strong and sound, although his hand trembled from age and disease, could not have imitated, successfully, the natural signature of B. O. Tyler. And upon ex-

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amining the marks to these deeds, with a microscope, and comparing them with the marks of Mr. Lansing to other papers made about the same time, any one who has ever turned his attention to such subjects will be satisfied that the marks to these deeds could not have been made by his unaided hand. This part of the charge of the judge, however, becomes unimportant, when taken in connection with the testimony of the subscribing witness to the deeds. For he swears that the marks were made by his father's assistance in guiding the hand of the grantor, and at the request of the latter. It is a very common thing, in such cases, for the party who is to execute an instrument as a marksman, merely to touch the pen, while the mark is really made by the hand that controls and guides the pen. If that was the case here, it would have been perfectly natural for Mr. Russell to try to make the mark so as to resemble that made by the trembling hand of an aged person. And if so, the mark itself would probably exhibit the regular rolling curves which the microscope shows to exist in the marks to both of these deeds.

The remarks of the judge that the answer of Mr. Russell, denying that he guided the hand of the grantor in the deeds, was in response to the charge, in the bill, that Mr. Lansing's hand was forcibly guided, and was not the vital question in the cause, could not have been intended, by the judge, to convey an intimation to the jury that the charge made in the bill was not vital. For the charge was, in substance, that the hand of the grantor was forcibly guided, so as to compel him to make the marks against his will; which would have been a forgery as well as a fraud. But the judge undoubtedly intended to tell the jury that it was not the vital question in the cause whether the hand of Mr. Lansing was guided by Mr. Russell in making the marks; that the vital question, and the one which was intended to be denied in the answer, was whether the hand of the grantor was forcibly guided.

The remaining question to be considered is whether the verdict, upon any or all of these issues, is so much against the evidence as to make it proper to award a new trial on that

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ground. And here, instead of examining the testimony at length, I shall merely state the conclusions at which I have arrived. In the first place, I am satisfied that the grantor in the deeds was not technically of unsound mind, so as to be mentally incapable of making a valid deed. The acts of some of the complainants show that they did not consider him as non compos mentis. The verdict upon the first issue, therefore, was not against the weight of evidence. I have also arrived at the conclusion that the subscribing witness to the deeds has testified honestly, and has neither been guilty of forgery nor of perjury. He is not impeached, nor is his testimony contradicted, in any essential particular, so as to render it necessary for the court to conclude that either he or the witnesses on the other side have intentionally perverted the truth; though the particular circumstances have been misrecalled by one or the other of them. The story told by him is not inconsistent with probability. The jury, therefore, were not bound to believe that his testimony was false. It necessarily follows from the conclusion at which I have arrived as to his testimony, that these conveyances were not forgeries, but that the marks of the grantor were put to them with his concurrence or assent; although he may have entirely misapprehended the actual meaning and effect of one or both of the deeds. And in coming to this conclusion, I lay out of question the testimony of Solomon Russell as to his conversation with Mr. Lansing after the date of these deeds. For his testimony is contradicted by a witness who swears that Russell could not have seen the old gentleman, so as to have had a conversation with him, at the time stated.

I am also satisfied, from the evidence, that the Salem farm was intended to be held, by C. Lansing, only as a security for the advances made to, and the responsibilities which he had assumed for, Mr. Russell. And upon the trial of this issue it was competent to prove that the deed was in equity a mortgage merely; though at law it vested the title to the farm in the grantee. From the evidence I conclude also that the state of the accounts between the parties was such that Mrs. Russell,

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and her husband and children, would not have been put upon a footing of equality with the other branches of her father's family if her father had retained the Salem farm and had also charged her ten thousand dollars for his advances. On the other hand, I am satisfied from the evidence that D. Russell had not paid the whole amount of the advances and responsibilities, which Lansing had made and assumed for him, at the time of the giving of the receipt or agreement, of 1837, to reconvey the Salem farm. I think the proof shows that something like \$10,000, including interest, must then have been due; and that equality between the different branches of the family would not be produced by conveying the Salem farm to Mr. Russell, and the homestead of her father to Mrs. Russell. Such equality would probably have been produced if the Salem farm had been reconveyed to Mr. Russell and the will had remained as it was; leaving the homestead to be divided among all of the eight children of Mr. Lansing, and their descendants.

The receipt which was given in the fall of 1837, subsequent to the making of the will, and after its contents were known, strengthens this supposition. By that will Mrs. Russell's eighth of the testator's property was charged with \$10,000 of the advances made and responsibilities assumed for her husband. It would therefore be perfectly natural, as well as reasonable, for Mr. Russell to say to his father-in-law, "You have already charged my wife with \$10,000 of my indebtedness, by your will. Now give me a writing that upon my paying to you the balance, beyond the \$10,000, you will reconvey to me the Salem farm; and let the will stand as it is." And if the balance then due was but \$500, which it probably was, it would have been almost a matter of course for the old gentleman to have given such a receipt, if he had made up his mind not to interfere with the provisions of the will. The testimony of Van Schoonhoven corroborates this view of the case. For the application to him by Russell, was to get him to persuade the old gentleman to convey the Salem farm; not to ask him to alter his will. And if Mr. Lansing had already adjusted the balance in this way

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and made it all right by giving his son-in-law a written agreement to reconvey the Salem farm when the balance beyond the \$10,000 was paid, his answer to the application of Van Schoonhoven was perfectly sensible and proper. How or when the \$500, stated in the receipt as the balance to be paid, was discharged, does not appear from the testimony; though Solomon Russell says Mr. Lansing told him it was paid. It is probable, therefore, that the deed of the Salem farm was understandingly executed, and ought not to be disturbed.

The other deed, which professes to be given to make Mrs. Russell equal with the other children, and without any other consideration of value, cannot be sustained if she had already been made equal by the agreement to reconvey the Salem farm; leaving unpaid \$10,000 of the advances. And under the circumstances, and considering the situation in which Mr. Lansing was when it was executed, I think the defendants were bound to show how the shares of the estate were to be made equal, among the several children, by the giving of this deed. No explanation on this subject was given at the time the deeds were executed. But I can imagine that it would have been made equal if the very strange covenant, at the close of this deed to Mrs. Russell, had been a condition that the grantee should pay to the executors \$10,000, out of her share of the estate, for this homestead; thereby making her property equal in amount with the other children. This is the part of the deed that the old gentleman wanted read again. And his deafness and infirmities were such that I cannot believe he finally understood the effect of it to be what it now is.

Believing, as I do, that the grantor could not have understood the effect of this deed upon the division of his property, and the defendants having failed to prove that all the grantor's advances had been paid, so that this deed would equalize the shares of his estate between the grantee and the other members of the family, I must direct a new trial of this case, so far as relates to the deed of the homestead farm to Mrs. Russell, unless the defendants D. Russell and wife, within thirty days after the entry of the order upon this decision, deliver to the

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solicitor of the complainants a stipulation that a decree may be entered setting aside the deed to Mrs. Russell, without costs to either party, as against the other, in this suit. If such a stipulation is not given, there must be a new trial; at the circuit to be held in the county of Saratoga. And the costs of this application, in that event, are to abide the result of the suit.

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KINGSLAND vs. SPALDING.

Where money and property are received by A. for the use of B., under and by virtue of a judgment given, and an assignment of property made, to him by C., in trust to pay a debt due from C. to B., such money and property constitute, in equity, a trust fund, in the hands of A., for the payment of the debt provided for. And a judgment recovered against him, by B., for the amount thus received by A., for his use, is a fiduciary debt, which will not be discharged by A.'s bankrupt certificate.

Where a judgment has been recovered against a person on the ground that he has received moneys to the use of the plaintiff, under an assignment made and a judgment given in trust for the benefit of the latter, the defendant is estopped from litigating the question again—in a creditor's suit founded upon such judgment—either as to the fact of its being a fiduciary debt, or as to the amount received in his fiduciary character.

A decree, sentence, or judgment, of a court of competent jurisdiction, is conclusive upon the parties, in a future litigation of the same question between those parties, or those claiming under them; whether such question arises directly or collaterally in the subsequent litigation; provided the question of estoppel is brought before the court in the proper form.

Where the former decision of the same matter can be set up in pleading, as an estoppel, the party who wishes to avail himself of it must plead it in bar of the further litigation of the same matter. But in those cases where the form of proceeding does not allow of special pleading, it may be given in evidence; and is conclusive upon the parties, the court, and the jury.

Whether a regular default will be set aside to let in the defendant to set up his discharge under the bankrupt act? *Quære.*

THIS was an application, on the part of the defendant, to open an order referring this cause to a vice chancellor for decision, and the order to close the proofs in the cause, both of

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which orders had been regularly entered; and to let the defendant in to set up a discharge under the bankrupt act, as a defence to the suit. The defendant was a judgment debtor of the complainants, on a judgment which they had recovered for money had and received by him, to their use, by virtue of a judgment given to him, by confession, and under an assignment to him, by John Cronkhite, of certain property, in trust to pay the complainants and other creditors of Cronkhite; for the payment of whose debts Spalding stood in the situation of a surety. The judgment was recovered prior to the alleged discharge of the defendant under the bankrupt act; and an execution thereon was issued and returned unsatisfied. The complainants thereupon filed their bill to reach the property of the defendant, which was in his possession or under his control at the time of the commencement of this suit. The bill set out the facts in relation to the recovery of the judgment, and the pretence of the defendant that his personal liability, for the payment of the judgment, had been discharged under the bankrupt act, and insisted that he was estopped, by the recovery of the judgment, from alleging that the debt for which such judgment was obtained was not a fiduciary debt.

*N. Hill, Jun. & S. Stevens*, for the complainants.

*A. Taber & L. Birdseye*, for the defendant.

THE CHANCELLOR. The proceedings on the part of the complainants to close the proofs, and the reference of the cause to the vice chancellor for decision, were perfectly regular; and I have great doubts whether this court ought to let the defendant in to set up the technical defence of a discharge under the voluntary provisions of the late bankrupt act, even if there was a reasonable probability that the debt was discharged by the proceedings in bankruptcy. It is not necessary, however, to put my decision of this application upon that ground; for I am satisfied that this judgment was not discharged by the proceedings in bankruptcy.



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The moneys and other property received by the defendant, under and through the assignment of Cronkhite, and the judgment confessed by him to Spalding, constituted, in equity, a trust fund, in the hands of the latter, for the payment of the complainant's debt. And the judgment under which this creditor's bill has been filed having, as the affidavits show, been recovered upon the ground that Spalding had received moneys to the use of the complainants, to the amount of the recovery in that case, under the assignment and the judgment against Cronkhite, the defendant is estopped from litigating the matter again, in this suit, either as to the fact of its being a fiduciary debt, or as to the amount which the defendant had received in his fiduciary character, for the use of the complainants as the equitable owners of the trust fund.

The rule on this subject is, that a decree, sentence, or judgment, of a court of competent jurisdiction, is conclusive upon the parties, in any future litigation of the same question between the parties to such decree, sentence, or judgment, or those claiming under them; whether the question arises directly or collaterally in such subsequent litigation: provided the question of estoppel is brought before the court in the proper form. Where the former decision of the same matter can be set up in pleading, as an estoppel, the party who wishes to avail himself of it must plead it in bar of the future litigation of the same matter. But in those cases where the forms of proceeding do not allow of special pleading, it may be given in evidence; and is conclusive upon the parties, the court and jury. (*Wright v. Butler*, 6 *Wend. Rep.* 284. *Young v. Beach*, 7 *Cranch's Rep.* 565. *Estell v. Taul*, 2 *Yerg.* 467.) And it makes no difference, in this respect, that the object of the first suit was entirely different from that of the second. Thus, in the case of *Betts v. Starr*, (5 *Conn. Rep.* 550,) where a mortgage was given to secure the amount due upon a promissory note; an ejectment suit was afterwards brought, upon the mortgage, to recover the possession of the mortgaged premises, and the defendant attempted to go into proof to show that the mortgage was usurious, as a defence to the suit. The plaintiff, however, produced the record

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of a judgment in his favor upon the note, given with the mortgage, and proved that under the plea of the general issue the defendant in the former suit attempted to set up the defence of usury, but failed. And the court thereupon decided that the verdict and judgment in the suit upon the note were conclusive of the fact that the mortgage, which was given at the same time with the note, and to secure the same debt, was not usurious. The cases of *Preston v. Harvey*, (2 *Hen. & Munf. Rep.* 55,) in the court of appeals in Virginia, and of *Rice v. King*, (7 *John. Rep.* 20,) in the supreme court of this state, are to the same effect.

The motion must therefore be denied, with costs.

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 SEAMAN vs. STOUGHTON and KIMBALL.

Where to a bill, by a creditor, against his debtor and the assignee of the latter, under an assignment for the benefit of creditors, praying for an account of the assigned property, and for the payment of the complainant's debt, and other debts provided for in the assignment, the assignee pleaded that the assignor, after making the assignment, presented his petition to the district court, praying that he might be declared a bankrupt pursuant to the act of congress on the subject; and that such court made a decree appointing an assignee of his estate and effects; whereby all the property assigned by the debtor to the defendant became vested in the assignee in bankruptcy; *Held* that the plea did not contain the necessary averments to show that the debtor was legally declared a bankrupt, so as to vest his property in the assignee in bankruptcy.

To show that the court had jurisdiction to proceed, upon the petition of a debtor, under the voluntary provisions of the bankrupt act, the plea setting up a discharge in bankruptcy, or a right acquired under the decree therein, should state that the petition set forth a list of the petitioner's creditors and an inventory of his property, and that such petition was duly verified. It should also distinctly appear that the bankrupt owed debts which had not been created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity.

An assignment made by a debtor, of his property, in contemplation of bankruptcy, and for the purpose of giving preferences, is not absolutely void, for all purposes.

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so as to leave the title to the assigned property in the assignor, as if no assignment had been made. But it is only void as against an assignee properly appointed under the bankrupt act.

THIS case came before the chancellor upon an appeal by the defendant Stoughton from a decretal order of the vice chancellor of the first circuit, overruling a plea to the complainant's bill. The complainant was a creditor of the defendant Kimball in March, 1842, and his debt was provided for, either wholly or in part, by an assignment of the property of his debtor, to Stoughton, in trust for the payment of debts. The bill in this cause was filed by the complainant in behalf of himself and all the other creditors provided for in the assignment, for an account of the assigned property, and for the payment of their respective debts out of the same, in the manner provided for in the assignment. Kimball resided in New-York at the time of the assignment; and such assignment, which was made in March, 1842, and embraced all his property and effects, showed upon its face that at the time it was made the assignor contemplated his bankruptcy, and that his property was then insufficient to pay all his debts.

The defendant Stoughton pleaded in bar of the whole discovery and relief sought by the bill, that at the time of the assignment, in March, 1842, Kimball was hopelessly insolvent; and that such assignment was executed for the purpose of giving to certain of his creditors a preference over his general creditors; that the assignor immediately removed to the state of Massachusetts, and in August, 1842, presented his petition to the district court of that state, praying to be declared a bankrupt, pursuant to the act of congress on that subject; and that in pursuance of such petition the district court, on the 19th of October thereafter, made a decree appointing C. C. Paine of Boston assignee of the estate of Kimball; whereby, as the defendant was advised by his counsel, all the property assigned by Kimball, to the defendant Stoughton, became vested in Paine, as such assignee in bankruptcy.

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*F. H. Upton*, for the appellant. The assignment set forth in the bill of complaint, from Alvah Kimball to the defendant Stoughton, constituting the basis of the claim of the complainant, was utterly void under the bankrupt law of the United States; (1.) Because it was made while that law was in operation; (2.) Because it was made in contemplation of bankruptcy; and (3.) Because it was made for the purpose of giving to certain of the creditors of Kimball a preference and priority over his general creditors. The plea distinctly alleges these facts, and is therefore a good plea in bar to the bill of the complainant. (*Bankr. Law of U. S.* § 2. *Owen on Bankruptcy*, app. In the matter of *Lucius Eames*, 5 *Law Rep.* 117. *Ex parte Rufus Hoyt*, 1 *N. Y. Legal Obs.* 132. *Barton v. Tower*, 5 *Law Rep.* 214. *Gasset v. Morse*, 3 *N. Y. Legal Obs.* 353.)

The assignment, under which the complainant claims, being declared by the act of congress to be *utterly void*, it can have no validity whatever under the state law; which ceased to exist upon the passage of the general bankrupt law. (*Sturgis v. Crowninshield*, 4 *Wheat.* 122. *Ogden v. Saunders*, 12 *Id.* 263. *Barton v. Tower*, 5 *Law Rep.* 214.) The assignment is not merely voidable. It is as if it had never existed; and is without force or validity for any purpose, or between any parties. It is a mere nullity. The grantee took no property by virtue of it; and therefore cannot be compelled to answer a bill calling upon him to account for the execution of a trust which was never created. Hence the plea is a good plea in bar of this suit; and the vice chancellor erred in overruling it. (*Hone v. Woolsey*, 2 *Edw.* 289. *Henriques v. Hone*, *Id.* 120. *Mills v. Hooker*, 6 *Paige*, 577. *Mackie v. Cairns*, 5 *Cowen*, 564. *Grover v. Wakeman*, 11 *Wend.* 189.)

*S. D. Van Schaack*, for the respondent. The plea admits all the facts stated in the bill which are not denied by such plea. (*Bogardus v. Trinity Church*, 4 *Paige*, 178. 1 *Barb. Prac.* 120.) These facts thus admitted are, the indebtedness by Kimball, and the assignment to Stoughton; the sale of groceries, and the receipt of several thousand dollars therefor, and also

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the collection of \$2000 of the debts by Stoughton; that the assigned property produced more than enough to pay the preferred debts; that Stoughton has paid dividends to the amount of \$450; and that he has applied the funds and property to his own use. These facts being admitted, the defendant Stoughton pleads that the creditors provided for by the assignment have no right to call him to an account. The plea sets up a mere decree for the appointment of an assignee in bankruptcy, but fails to show any accounting with that assignee; or any decree of a competent court declaring the assignment void, or otherwise invalidating it. An assignment may be void for certain purposes, and still valid as between the cestui que trust and the assignee, so as to permit the cestui que trust to enforce it in equity. (*Mills & Hooker v. Argall*, 6 *Paige*, 577. *Dodge v. Sheldon*, 6 *Hill*, 9.) Although an assignment is void at law when executed, if the proceeds have been paid over to the creditors provided for therein they cannot be reached. (*Wakeman v. Grover*, 4 *Paige's Rep.* 24. *Ames v. Blunt*, 5 *Id.* 13.) So that if the prayer of this bill be granted, Stoughton cannot be afterwards called to account by the assignee in bankruptcy for the effects paid over to us under the decree. This assignment is void only as to persons claiming in virtue of proceedings under the bankrupt act. (*Dodge v. Sheldon*, 6 *Hill*, 9.) The assignment is still valid between the parties to this bill, and has never been impeached, by creditors or otherwise. The assignee has received large sums of money which he has applied to his own use. He does not show, by his plea, any accounting with the assignee in bankruptcy, nor any proceeding to compel him to account. There is nothing, therefore, in this plea, that should deprive the complainant of his right to discovery and relief. The plea is also defective in not stating the necessary facts to give the United States court jurisdiction to make a decree declaring the petitioner a bankrupt.

THE CHANCELLOR. The plea in this case does not contain the necessary averments to show that the defendant, A. Kimball, was legally declared a bankrupt, so as to vest the as-

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signed property in C. C. Paine, the official assignee appointed by the district court. The plea merely states that the supposed bankrupt resided in the state of Massachusetts, and that he presented a petition praying that he might be declared a bankrupt, pursuant to the act. To show that the court had jurisdiction to proceed upon his petition, under the voluntary provisions of the bankrupt act, he should have stated, in the plea, that his petition set out a list of his creditors, and an inventory of his property, and that it was duly verified. It should also distinctly appear that he owed debts which had not been created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity; so as to bring him within the description of persons who were authorized, by the first section of the bankrupt act, to apply for the benefit of that act as voluntary bankrupts. (*Sackett v. Andross*, 6 *Hill's Rep.* 327. *Salters v. Tobias*, 3 *Paige's Rep.* 338.) The plea being insufficient to show that Kimball was ever legally declared a bankrupt, so as to vest any of his property in the official assignee, the question arises, whether the assignment to the appellant, for the benefit of the creditors, was absolutely void for all purposes, so as to leave the whole title to the property in the assignor, as if no assignment had ever been made; or whether it was only void as against an assignee properly appointed under the bankrupt act.

This assignment, upon its face, shows that it was made in contemplation of bankruptcy. And, as against an assignee duly appointed under the bankrupt act, or those who should claim under him, it would unquestionably be void; as a fraud upon the rights of creditors who should come in and prove their debts under the decree in bankruptcy. And as congress has the power to establish an uniform system of bankruptcy throughout the United States, I am not prepared to say it has not authority, by the constitution, to prohibit any person, who has become a bankrupt, from assigning his property for the purpose of giving a preference to one class of creditors over another, where he has not the means of paying the whole; so as to leave

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all his creditors to a fair race of diligence, in obtaining a priority of payment, by due course of law. Such, however, does not seem to have been the intention of the framers of the recent bankrupt law. Although the act declares all payments, assignments, securities, conveyances, and transfers of property, made or given in contemplation of bankruptcy, for the purpose of giving preferences, utterly void, the residue of the sentence shows that they are only void in reference to proceedings under the bankrupt law ; instituted by the petition of the bankrupt himself, or by an application of some of his creditors. For it declares such assignments a fraud upon the act ; and authorizes the assignee in bankruptcy to claim, sue for, and recover the property, as a part of the assets of the bankrupt. And it prohibits the discharge of the bankrupt who has been guilty of such a fraud in reference to the contemplated proceedings under the act.

This question was presented directly to the supreme court of this state for decision, in October, 1843, in the case of *Dodge & McClure v. Sheldon*, (6 *Hill's Rep.* 9 ;) and that court held that the assignment not being void by the state laws, and it not appearing that any proceedings had been instituted under the bankrupt act, while it was in existence, the assigned property was improperly seized by the sheriff, as belonging to the bankrupt, upon an execution against him. Indeed, it would be contrary to every principle of equity to permit a trustee, who has received the property of a debtor in trust to apply it to the payment of creditors, to set up the defence of fraud, in making and receiving the transfer for the benefit of such creditors, as a defence to a suit brought by them to compel a performance of the trust ; without showing that the fund had been recovered from him by the parties intended to be defrauded, or even that they had ever made any claim to it.

The order appealed from must therefore be affirmed with costs. And the appellant must pay the costs of the appeal and the costs awarded by the vice chancellor, and answer the complainant's bill within the forty days allowed by the order appealed from, after service of notice of the final decree, or the bill must be taken as confessed against him.

JANSEN and others *vs.* CAIRNES and wife, and others.

A testator, by his will, devised and bequeathed to his wife all the income of his real and personal estate for life. And after her death he gave certain portions of his estate to the children of her brother. He then gave the residue of his estate, after the death of his wife, to A. E. T. during her life, subject to certain charges. By the fourth clause of his will he gave to the children or issue of A. E. T. \$10,000, after her death, and to the children of W. P. T. and A. J. S. \$20,000; one half to the children of each. By the fifth clause he gave to W. P. T., A. J. S. and E. S., as the same was possessed by his wife and A. E. T., if they outlived the latter, for life. By the sixth clause the testator gave the residue of his estate, real and personal, to E. S., to her and her children forever, to them and their heirs. And he left her, when she arrived at age, \$50,000, *any thing in his will contained to the contrary notwithstanding*. By the ninth clause the testator provided that in case E. S. should die without leaving issue, in that case, and no other, the whole of his estate that might then remain should go to his paternal and maternal cousins, &c. On a bill by a part of the paternal heirs and next of kin of the testator, for the purpose of obtaining their shares of his estate, upon the ground that the several dispositions of the property made by his will, except the life estate therein to his wife, were invalid; and to have the \$50,000 legacy to E. S. declared void—

*Held* that the absolute ownership of the \$50,000 of the testator's personal estate was not suspended for more than two lives in being at the death of the testator, by the contingent legacy to E. S. and her issue; and that her right must vest in interest and in possession, if ever, during the continuance of one life in being at the death of the testator. That although the first and third clauses of the will gave successive life estates in the income of the real and personal property, generally, to the widow and to A. E. T., yet that those general devises and bequests must be taken in connection with other provisions of the will; and must be construed, if possible, so as to be consistent therewith.

*Held also*, that the legal effect of the will, so far as related to the interests of the widow and A. E. T. and E. S., in the amount of the \$50,000 legacy, was the same as if the testator had ordered \$50,000 of his personal estate to be set apart and invested, so as to produce an income, and that the capital of the fund should be paid to E. S. when she arrived at twenty-one, if she lived to attain that age; and had limited successive estates in the income of the \$50,000 for the lives of the widow and A. E. T. respectively, unless the contingency sooner happened by which the capital became payable to E. S.

*Held further*, that upon the arrival of E. S. at the age of twenty-one, she would be entitled to the payment of the capital of the \$50,000, as her absolute property.

Whether the life estate of A. E. T. in the income of the amount of the \$50,000 legacy was not invalid; on the ground that it might suspend the absolute ownership of that part of the fund for a longer period than two lives in being at the death of the testator? *Quære*.



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Jansen v. Cairnes.

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THIS case came before the chancellor upon an application by the complainants, for an injunction and receiver.

George Rapelye of the city of New-York, died in May, 1835, without lawful issue, leaving a large real and personal estate. By his will, executed in due form of law, he devised and bequeathed to his wife all the income of his real and personal estate for life; and appointed her the executrix of his will, during her life. After her death he gave certain portions of his estate to the children of her brother. He then gave the residue of his estate, after the death of his wife, to A. E. Taylor, who afterwards married the defendant W. Cairnes, jun. during her natural life, charged with the education and support of W. P. Taylor, Anne J. Smith, and Ellen Eliza Smith. By the fourth clause of his will he gave to the children or issue of A. E. Taylor \$10,000, after her death, and to the children of W. P. Taylor and Anne J. Smith \$20,000; one half to the children of each. By the fifth clause he gave his estate to W. P. Taylor, A. J. Smith, and Ellen E. Smith, as the same was possessed by his wife and A. E. Taylor, if they outlived the latter; to hold the same as joint tenants for and during their natural lives, and no longer. The sixth clause of the will was as follows: "I give, devise and bequeath the rest, residue and remainder of the whole of my estate, real and personal, unto the before named Ellen E. Smith, who I here consider and make my principal heir to my estate, that is, to her and her children, if she should have any, forever to them and their heirs; and I leave her when she arrives at age, fifty thousand dollars, *any thing herein contained to the contrary notwithstanding*. And I hereby nominate and appoint her third executrix to carry the provisions of this my last will into effect, with full power to execute the same." The seventh clause of the will protected the property devised and bequeathed to females, from the power or control of their husbands in case of marriage; and the eighth appointed A. E. Taylor, (now Mrs. Cairnes,) second executrix, to execute his will after the death of his wife; and appointed her guardian for W. P. Taylor, Anne J. Smith and Ellen Eliza Smith, to have the entire management of them during her life-

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time, and also of the property before devised for their benefit and advantage, to manage as she might deem most proper. And by the ninth clause of his will the testator provided that in case Ellen Eliza Smith should die without leaving issue, in that case and in no other, the whole of his estate that might then remain should go to his paternal and maternal cousins, and their children and descendants, in the manner in that clause of the will particularly specified.

At the death of the testator he left his wife, who had died before the filing of the bill in this cause, and A. E. Taylor, now Mrs. Cairnes, W. P. Taylor, Anne J. Smith and Ellen Eliza Smith—the latter of whom was about nine years of age—surviving him. After the death of Mrs. Rapelye, the widow, Cairnes and wife took out letters testamentary upon the estate; and this bill was filed by the complainants, who claimed to be a part of the paternal heirs and next of kin of the testator, for the purpose of obtaining their shares of the estate, upon the ground that the several dispositions of the property made by his will subsequent to the death of Mrs. Cairnes were invalid, and that the \$50,000 legacy given to Eliza Ellen Smith was also void

*W. C. Noyes*, for the complainants. The will contains a scheme for the disposition of the testator's real and personal estate; the general design of which is in violation of the revised statutes concerning trusts. Some of its provisions are plainly unauthorized and void. These provisions embrace some of the most important parts of the will; and the residue being comparatively insignificant portions of the same scheme, ought not to be permitted to stand. The remainder for life to Wm. Paul Taylor, Ann Janette Smith, and Ellen Eliza Smith, and the remainder in fee to Ellen Eliza Smith are void, under the provisions of the revised statutes; because they suspend the power of alienation for a longer period than during the continuance of any two lives in being at the creation of the estate. The power of alienation is suspended for more than two lives in being at the creation of the estate, because two prior life estates are given; which, with these three, make five in all. The ultimate re-

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remainder in fee, which is a contingent one, is to Ellen Eliza Smith, and her children ; the latter not in being. and who could not of course convey an absolute fee in possession. The remainder in fee to Ellen Eliza Smith is a contingent one, and is not made in conformity with section 20 of the article of the revised statutes concerning trusts ; so that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or at the termination thereof. The remainder to the children of Ellen Eliza Smith is also void upon common law principles, in regard to contingent remainders, as well as under the revised statutes. (1 *R. S.* 723, §§ 14, 15, 16. 14 *Wend.* 265. 16 *Id.* 61.)

The remainder devised by the ninth clause of the will, to the maternal and paternal cousins of the testator, being a contingent remainder in fee, created upon a prior remainder in fee, is void by the 16th section of the article of the revised statutes concerning trusts ; inasmuch as the same is not limited to take effect in the event that the persons to whom the first remainder is limited, should die under the age of twenty-one years, nor upon any other contingency by which the estate of such persons might be determined before they attain their full age. In reference to the personal property, this part of the will, and those parts creating remainders to Wm. P. Taylor, Ann J. and Ellen Eliza Smith, are in violation of that section of the revised statutes which declares that the absolute ownership of personal property shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance and until the termination of two lives in being at the death of the testator. (1 *R. S.* 773, § 1.) But whether this is so or not, is not material, as the complainants are paternal cousins, and as such would be entitled to take if this clause of the will was valid. The legacy of \$50,000 to Ellen Eliza Smith is also void. And the several legacies given by the fourth clause of the will are likewise void.

It results from the preceding views, that almost the entire structure which the testator attempted to rear, is opposed to the wholesome policy of our laws. And it is submitted that the

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remaining life estate, now claimed by Mrs. Cairnes, should not be permitted to stand. It can only be sustained by applying the *cy pres* doctrine; which it is believed is entitled to no particular favor, and is in fact not applicable to the present provision. This doctrine was intended to prevent a violation of the intention of the testator, where the language of the will was ambiguous, and where an estate was endeavored to be raised contrary to law, though the apparent intention was a lawful one; but at the same time to carry into effect this general valid intention in favor of the objects of his bounty, and to raise the estate according to law, so as not to violate any legal provision. (*Fearne on Rem. ed. 1826, by Butler, p. 203 and note.*) In *Bradnell v. Ellis*, (7 Ves. 390,) Lord Eldon said that the doctrine was not to be carried beyond the adjudged cases. And Mr. Butler observes that it should not be acted on without great consideration. The devise to Mrs. Cairnes was intended as a part of the provision for William Paul Taylor, Ann Janette Smith, and Ellen Eliza Smith; for the income is given to her with a charge for their support and maintenance. Why should this provision for their benefit remain valid when the devise directly to them is confessedly void? It was not the testator's intention to give her the estate, or to enable her to bestow it in marriage, or otherwise. The children were the objects of the testator's bounty; and her claim in their behalf is greatly diminished by the death of one of them. To sustain this provision will be giving her the property practically for her own use; which the testator never intended. Nor did he mean to give it to her disconnected from the other provisions of the will. His scheme was an entirety; to give them the whole income of the estate for life, by giving it to their mother for their use during her life, and to them after her death; and then over to Ellen Eliza Smith and her children, or to his paternal and maternal cousins, as provided in the last clause of the will. It is quite clear from these considerations either that the complainants and the other heirs at law of the testator, have the entire and present right to all the real and personal estate, or that they took a present interest in his real and personal estate

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in remainder after the termination of the life estates of his widow and Mrs. Cairnes, conceding those two life estates to be valid. In either event, they have such an interest in the real and personal estate as authorizes them to file this bill.

*Charles O'Connor*, for the defendants, insisted that there had been no misapplication of the funds; that the \$50,000 legacy was valid; and that there were no sufficient grounds for the granting of an injunction, or for the appointment of a receiver, in the present state of the suit.

THE CHANCELLOR. The decree in the suit instituted by John Emmons being appealed from, and it now appearing that he was not interested in the personal estate, as one of the next of kin who were authorized to take under the statute of distributions, that decree cannot affect the rights of any of the parties in this suit; so far as the personal estate is concerned. The question now before me must therefore be disposed of as if that decree had never been made. The papers read in opposition to this application, so far disprove the allegations in the bill in relation to the irresponsibility, and the alleged misconduct charged in the bill, against Cairnes and wife, in respect to the management of the estate, that there is no reason for putting the estate under the management and control of a receiver. The only question necessary to be examined, then, is as to the validity of the \$50,000 legacy, to Ellen Eliza Smith, given by the sixth clause of the will. For, if that legacy is void, Cairnes and wife should be enjoined from paying it over to her, in case the complainants have any interest whatever in the testator's personal estate, as a part of his next of kin.

But upon a careful investigation of the various provisions of this will, I have arrived at the conclusion that the assistant vice chancellor was wrong in supposing that the absolute ownership of that part of the testator's personal estate was suspended for more than two lives in being at the death of the testator by the contingent legacy of \$50,000, or that it can by any possibility be thus suspended. It is true the first and third

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clauses of the will give successive life estates, in the income of the real and personal property, generally, to the widow of the testator and to A. E. Taylor. But those general devises and bequests of the income must be taken in connection with other provisions of the will; and must be construed, if possible, so as to be consistent therewith. For instance, the devise of a life estate to A. E. Taylor, in the whole income of all the testator's real and personal property, immediately after the death of his wife, must not be taken to include the income of that part of the property which is given to the children of B. P. Provost after the death of the widow. Nor can it properly be held to give A. E. Taylor the income of the \$50,000 legacy for life, which by the terms of the will is payable immediately upon the arrival of Ellen Eliza Smith at the age of twenty-one.

The language of the will in relation to that legacy is peculiar. It is, "I leave her, when she arrives at age, in her own right and disposal, \$50,000; *any thing herein contained to the contrary notwithstanding.*" If this legacy, therefore, depends upon the contingency of her arrival at the age of twenty-one, it is payable immediately after her arrival at that age, even if the widow of the testator, and A. E. Taylor should both be living at that time; the other provisions of the will, giving them successive life estates in the income of the testator's property, to the contrary notwithstanding. The moment she arrived at the age of twenty-one, this \$50,000 was to be carved out of the testator's estate, and given to Ellen E. Smith, absolutely in full property; to be disposed of as she might deem proper. The giving of this legacy to her, therefore, could by no possibility suspend the absolute ownership of that part of the testator's property beyond her life, which was in being at the death of the testator. For if she arrived at the age of twenty-one it was to be paid immediately. And in case she died under that age, if the life estate of A. E. Taylor in that part of the testator's property, after that time, might have the effect to suspend the absolute ownership of the \$50,000 beyond the time allowed by law, the gift of the income of that part of the testator's personal property, to A. E. Taylor, after the death of the widow of

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the testator, would be void ; and not the contingent legacy to Ellen Eliza Smith, which must vest in absolute property, if ever, during the continuance of one life in being at the death of the testator.

The legal effect of the will, so far as relates to the interests of the widow, and of E. A. Taylor and Ellen Eliza Smith in the amount of the \$50,000 legacy, is the same as if the testator had ordered \$50,000 of his personal estate to be set apart and invested, so as to produce an income, and that the capital of the fund should be paid to Ellen Eliza Smith when she arrived at twenty-one, if she lived to attain that age ; and had limited successive estates in the income of the \$50,000, for the lives of the widow and A. E. Taylor, respectively, unless the contingency sooner happened by which the capital would become payable to Ellen Eliza Smith. Had the will been in this form it would have been perfectly evident that the contingent limitation to the legatee, of such capital, could not by any possibility suspend the absolute ownership beyond the life of such legatee, whether she did or did not live to attain the age of twenty-one ; and that if the absolute ownership was suspended after her death, under the age of twenty-one, it must be by the limitation of the two successive life estates in the income of that part of the testator's personal property, after the happening of that event. Therefore if the life estate in the income, after the death of Ellen Eliza Smith, which is limited to A. E. Taylor, suspends the absolute ownership, or might by possibility suspend the absolute ownership in the \$50,000, that limitation, and that only, is void ; under the provisions of the revised statutes. (1 *R. S.* 773, § 1.)

Upon the arrival of Ellen Eliza Smith at the age of twenty-one, therefore, she will be entitled to the payment of the capital of the \$50,000, as her absolute property. The application for an injunction, and for the appointment of a receiver must be denied with costs.

THE UNION BANK *vs.* BARKER and others.

It is well settled, independent of any statutory provision on the subject, that a defendant, in a bill in chancery, is not bound to make a discovery as to any charge of felony against him, or as to any criminal offence involving moral turpitude.

The language of the act of January 30, 1833, providing that a defendant shall be compelled to answer any bill in chancery charging him with being a party to any conveyance, or assignment, made or created with intent to defraud prior or subsequent purchasers, or to hinder or defraud creditors or other persons, or where the defendant shall be charged with any fraud whatever, affecting the rights or property of others, but that no such answer shall be received as evidence against any party thereto, on any complaint, or on the trial of any indictment for the fraud charged in the bill, is broad enough to embrace a fraud committed by the defendant by means of his own forgery. But it was not the intention of the legislature, by that act, to compel a defendant, in a bill in chancery, to answer such a charge upon his oath.

The act of 1833 was intended to embrace a class of frauds, affecting the rights of property, which were not punishable by the common law, but which, by the statutes of this state, are now made criminal; so that the effect of the several statutory provisions, subjecting persons guilty of such frauds to criminal prosecutions therefore, should not deprive the parties injured, of the discovery and relief to which they were formerly entitled in the court of chancery.

*Held*, accordingly, that defendants were not bound to answer a charge of having entered into a conspiracy to defraud the complainants and others by means of forgeries; and of having actually obtained several sums of money by means of forged drafts and checks.

THIS was an appeal by the complainants from an order of the vice chancellor of the first circuit. The bill in this case charged, in substance, that the defendants, J. Barker and T. Canouse, entered into a conspiracy to defraud the complainants and others by means of forgeries; that they obtained from the complainants several sums of money by means of forged drafts and checks, which were particularly specified in the bill; and that some of the proceeds of such forged drafts and checks, or of the moneys obtained thereon, were in the possession of the respondents, and some in the hands of the police, &c. The complainants therefore prayed for an injunction, to restrain the respondents from parting with the proceeds of the forged drafts and checks, &c. and for general relief. Barker and Canouse demurred to so much of the discovery sought by the



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bill as required them to answer as to the alleged conspiracy, and the obtaining of the funds of the complainants by means of the forgeries mentioned in the bill.

*S. A. Foote*, for the appellants.

*J. M. Smith*, for the respondents.

THE CHANCELLOR. It is perfectly well settled, independent of any statutory provision on the subject, that a defendant in a bill in chancery is not bound to make a discovery as to any charge of felony against him, or as to any criminal offence involving moral turpitude. The only question for consideration in this case, therefore, is whether the act of the 30th of January, 1833, (2 R. S. 103, § 46 of 2d ed.) extends to this case. The first section of that act provides that a defendant shall be compelled to answer any bill in chancery, where by law a bill may now be filed, charging the defendant with being a party to any conveyance or assignment of any estate or interest in lands, goods, or things in action, or of any rents or profits arising therefrom, or to any charge on any such estate, interest, rents, or profits, made or created with intent to defraud prior or subsequent purchasers, or to hinder or defraud creditors, or other persons, or where the defendant shall be charged with any fraud whatever, affecting the right or property of others. And the second section declares that no such answer shall be received as evidence against any party thereto, on any complaint, or on the trial of any indictment, for the fraud charged in the bill.

The language of this statute is probably broad enough to embrace a fraud committed by the defendant by means of his own forgery; an offence involving the highest degree of moral turpitude, which, by the common law, subjected the offender to the disgraceful punishment of the pillory, and which has long since been made a felony by our statutes. But it certainly could not have been the intention of the legislature, by the act of January, 1833, to compel a defendant in a bill in chancery to answer such a charge upon his oath. There is another class

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of frauds, however, affecting the rights of property, which were not punishable at all by the common law, but which by the statutes of this state are now made criminal. And it was this class of frauds which the act referred to was intended to embrace ; so that the effect of the several statutory provisions, subjecting persons guilty of such frauds to criminal prosecutions therefor, should not deprive the parties injured of the discovery and relief to which they were formerly entitled in this court.

The vice chancellor was right in supposing that the respondents were not bound to answer upon oath as to the charges of felonious forgery, covered by the demurrer to the discovery sought in this case. The order appealed from must therefore be affirmed with costs.

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 JOHNSON and CLARK vs. FITZHUGH and others.

[Not followed, 6 Fed. Rep. 61.]

Where a decree is actually made by the court of chancery, before the discharge of a defendant under the bankrupt act, for the payment of a debt which was contracted before the proceedings in bankruptcy were instituted, such debt may be proved under the decree in bankruptcy. And the discharge of the defendant is a bar to any suit, or other proceeding upon the decree, to charge the defendant personally with the debt ; unless such discharge can be successfully impeached for some of the causes specified in the bankrupt act.

Where a bill is filed against husband and wife, to foreclose a mortgage executed by them, but before a decree is obtained in that suit, the husband is declared a bankrupt, by the decree of the district court, the effect of that decree is to vest in the assignee in bankruptcy, the whole interest of both defendants in the mortgaged premises, except the inchoate right of dower of the wife in the equity of redemption. And unless the assignee in bankruptcy is made a party to the suit, after the decree in bankruptcy, a decree of foreclosure, subsequently obtained, will be a nullity, as to him ; and will not foreclose his equity of redemption in the mortgaged premises.

The proper course for the complainant, in such a case, after the decree in bankruptcy has been obtained, is to file a supplemental bill, in the nature of a bill of revivor ; to revive and continue the proceedings against the assignee in bankruptcy as the party upon whom the equity of redemption has been cast by operation of law.

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In ordinary cases, although a judgment technically changes the nature of the debt, it is still in fact the same debt which was due at the commencement of the suit; and if contracted previous to the institution of proceedings in bankruptcy against the debtor it will be barred by his discharge, where such discharge is obtained subsequently to the entry of the judgment.

Since the act of May, 1840, concerning costs and fees in courts of law, &c. it is not necessary for the registers or clerks of the court of chancery, or the clerks of the supreme court, to docket decrees or judgments in the books of their own offices; and if done, it will not affect the rights of either of the parties to the decree or judgment, or cast a cloud upon the title of the defendant in such suit to his real estate.

Where a decree in chancery is entered against a defendant, subsequent to the institution of proceedings in bankruptcy by him, and he afterwards obtains his discharge, and is then sued in an action at law, upon the decree in chancery, his proper course is to plead his discharge, in bar of the suit at law; inserting in his plea the proper averments to show that the debt for the payment of which the decree was made was contracted prior to the presenting of his petition in bankruptcy; so as to be provable under the proceedings in bankruptcy, and to have been affected by the discharge.

The dictum of Bronson, J. in *Thompson v. Hewitt*, (6 Hill, 254,) that the original debt was merged and extinguished by the judgment, limited to the case which he then had under consideration.

THIS was an appeal by Fitzhugh, one of the defendants, from an order of the vice chancellor of the fifth circuit, denying the application of the defendant Fitzhugh, to set aside the docket of a decree, in the books of the clerk of this court, made on the 12th of June, 1843. The bill in this cause was filed to foreclose a mortgage, given by Fitzhugh and wife, and to obtain satisfaction of a debt which was also secured by the personal bond of Fitzhugh, dated in 1836. In January, 1843, Fitzhugh presented his petition for a discharge under the voluntary provisions of the bankrupt act, and was decreed a bankrupt on the 20th of February thereafter; and he obtained his discharge on the 5th of June in the same year. On the 3d of February, 1843, the complainants filed their bill against Fitzhugh and wife, to foreclose the mortgage; and in April, 1843, the usual decree of foreclosure and sale, and a decree over against Fitzhugh for the deficiency, was entered. The mortgaged premises were sold in May, 1843, leaving a deficiency of about \$5000. The clerk of the court of chancery entered

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the usual docket of the decree in his books ; but no transcript was filed with the clerk of any county, so as to make the decree a lien upon the real estate of the defendant Fitzhugh. In April, 1846, the complainants commenced a suit in the supreme court against Fitzhugh, on the decree, for the deficiency which was the first notice the defendant had that the clerk of this court had entered the decree upon his docket. The vice chancellor refused to set aside the docket of the judgment, but allowed the defendant Fitzhugh, if he should elect to do so, to come in and file a supplemental bill for the purpose of setting up his discharge, under the bankrupt act, as a bar to a personal decree against him for the deficiency ; upon payment of costs, including the costs of the complainants in the supreme court.

The following opinion was delivered by the vice chancellor.

P. GRIDLEY, V. C. The defendants' counsel has strenuously insisted that the decree for the balance of the complainants' debt, which remained unsatisfied after the sale of the premises, was irregular, or at least that it was entered in bad faith ; and in either case that it should be set aside or cancelled. I have been unable to discover any solid foundation for this argument. A bill filed to foreclose a mortgage against one who has given a personal obligation to pay the mortgage debt, should be regarded, since the provision of the revised statutes authorizing a decree for the deficiency, in a two fold aspect ; as a proceeding *in rem*, until the premises are exhausted, and *in personam*, for the satisfaction of any remaining balance which may be due. And a defendant in such a suit, who has been personally served with a subpœna, as in this case, is just as much bound to take notice of the proceedings in the cause to charge him by a decree for the balance, as a defendant in an action at common law is bound to notice the rendition of a judgment which is regularly recorded against him after due service of process. In this case it is not denied that the complainants regularly pursued all the customary steps, in the cause, to the entering and perfecting of this decree for the balance ; without the interposition of any defence, or any notice that any existed.

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Where then was the irregularity in the decree? Most clearly there was none.

But it is argued that after the sale of the mortgaged premises, the defendant was discharged as a bankrupt; and that the complainants' debt being thus extinguished, the docketing of the decree afterwards was in bad faith. If a suit for the recovery of a personal demand had been pending against the defendant, and the demand had been paid or released to the plaintiff, the entering of a judgment afterwards would have been in bad faith; but is this a parallel case? In the first place there is no pretence that the complainants had any knowledge of this discharge before the docketing of the decree, on the 12th of June, 1843. Suppose, however, they had received a notice of filing the defendant's petition, it by no means follows that they knew, or that they were to take notice, at what particular time a discharge was granted, or whether it was granted at all. On the contrary, it is the business of the defendant, who intends to rely on his discharge as a defence, to watch the proceeding in any suit that is pending against him; so as to enable him to plead it *pais darrein continuance*, or otherwise. Or if it be too late for that, to move for leave to open a default, and to do so *ore tenus*. (*Scott v. Grant*, 10 *Paige's Rep.* 485. 1 *Cowen*, 42, 165. 3 *Id.* 13. 15 *John. Rep.* 152. 18 *Idem*, 54. 1 *John. Cases*, 105.) Otherwise the judgment is not barred by the discharge. (*Rees v. Gilbert*, 2 *Maule & Selw.* 70. 14 *East*, 197.) Several of the authorities show that this rule is rigorously enforced in cases where any objection is set up, in the opposing papers, to the validity of the discharge. (*Baker v. Taylor*, 1 *Cowen*, 165. 10 *Paige's Rep.* 485. *Bangs v. Strong*, 1 *Denio*, 619.) In this case the opposing affidavit suggests the existence of facts having a tendency to prove the discharge fraudulent. And as to a part of the demand embraced in the decree for the balance, they set up a promise to pay, which, in *Thompson v. Hewitt*, (6 *Hill*, 255,) was held to be a bar to any relief on motion. The counsel for the defendant, however, relies on the remarks of the chancellor in the case of *Alcott v. Avery*, (1 *Barb. Chan. Rep.* 347.) I do

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not think that the principle of that case conflicts in any degree with the conclusion to which I have arrived in this. The facts there differed most widely from those in this case, in two very important particulars. In that case the complainant was attempting to enforce his decree in the court of chancery—not so here. The complainants have issued no process on their decree, but have brought an action on it, in the supreme court; where the defendant may plead his discharge in bar of the decree. And unless the dictum in *Thompson v. Hewitt*, (6 *Hill*, 255,) that the judgment, or decree, is a new debt, and not affected by the discharge, be good law, the validity of the charge may as well be settled in that court as in this. In the case of *Alcott v. Avery* also, the petition of the bankrupt was filed and his discharge obtained after the decree was perfected. No opportunity therefore existed, in that case, to set up the discharge. In this case, however, after the sale of the premises, and before the filing of the report of sale and of the unsatisfied balance, there was abundant opportunity to set up the discharge, by a cross-bill. (*Mitf. Pl.* 82, 3d ed. of 1833. 10 *C. & P.* 85.) And if it had been necessary, to enable the defendant to do this, he might have moved to open so much of the decretal order of sale as declared the personal liability of the defendant for any deficiency that might be reported by the master.

For these reasons I am of the opinion that the complainants were chargeable with no irregularity, or bad faith, in docketing the decree for the balance reported by the master. But as the dictum in *Thompson v. Hewitt*, before referred to, may render it doubtful whether the discharge can be safely relied on, as a defence to the action on the decree, in the suit at law; and inasmuch as the defendant swears to his ignorance not only of the decree for the deficiency, but of the fact that a personal decree could be obtained in such a suit, he may be relieved, so far as to open the proceedings, and enable him to set up his discharge in a cross-bill or otherwise. This, however, must be upon payment of the costs of the proceedings thus set aside, the costs of the suit in the supreme court and of opposing this motion.

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I think also the decree ought to stand as a security in the meantime. (1 *Cowen*, 165. 1 *Denio*, 619.)

*W. F. Allen*, for the appellant. The debt for which this decree was rendered was discharged and satisfied by the proceedings and certificate in bankruptcy. It was due and owing at the time of the presentation of the petition of the defendant to be decreed a bankrupt; was provable as a debt under the bankrupt act; and it was not contracted by the defendant while acting as executor, administrator, or in any other fiduciary character. (*Bank. act of 1841*, § 4.) The only limitation or restriction upon the effect of the discharge is in the last proviso to the second section of the act; which protects certain rights and liens, by mortgages and otherwise. The fourth section of the act provides that the discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of the bankrupt, which are provable under the act. I can see no reason why this debt was not provable under the act. It was a debt existing at the time of the first proceedings of the defendant under the act. The defendant was decreed a bankrupt in February, 1843. At that time the complainants had taken no proceedings in their suit except to file a bill; which they filed after the defendant had filed his petition for the benefit of the act. The complainants were then in a situation to prove their original debt. For it had not then been changed in form. It is true they would have had to discontinue their proceedings as against the defendant personally, but probably not against the property mortgaged. That they did not prove their debt cannot affect the defendant's rights. It is enough for him that they might have proved it.

The entry of the final decree in the suit, in April, 1843, two months before the defendant was discharged from his debts, did not so far alter or change the debt as to prevent the operation of the discharge and certificate, as a bar to any personal claim against him. The filing the bill of foreclosure, after the commencement of the proceedings in bankruptcy, and proceeding

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to a decree thereon, before the certificate of discharge, were acts of the complainants which ought not injuriously to affect the rights of the defendant. At the time the decree was granted he had nothing to allege either in bar, or even in delay, of the proceedings. The debt was not changed, but remained the same debt. If we admit the dictum of the supreme court, in *Thompson v. Hewitt*, (6 *Hill's Rep.* 254,) to be law, it by no means follows that the principle would apply to this case. There the defendant, by a voluntary confession of a judgment, renewed his liability to pay the debt. The judgment therefore was not the sole act of the plaintiff and of the court, but was rendered upon the confession of the bankrupt himself, after the presentment of his petition in bankruptcy. Not so in this case. Again; a decree in chancery is different in form, and in the remedy which it gives, from a judgment at law. The decree in this case is founded on, and refers to, the mortgage, and in all its mandates and directions refers to the mortgage, and the debt due upon it, as the thing of substance. Not so a judgment at law. Can there be a doubt that even after a sale of the mortgaged premises the complainants could have proved, for the deficiency, under the bankrupt act? (*Eden on Bankrupt Law*, 104, 107.) Could the defendant, or the other creditors, or the assignee in bankruptcy, object that the claim for the deficiency was not the debt due on the mortgage, but a new debt created after the commencement of the proceedings in bankruptcy? If they could not, then the complainants cannot now object that the debt is not barred by the decree and certificate; for the rights and liabilities of the parties must be mutual. (*Phillips v. Brown*, 6 *T. R.* 282. *Ex parte Hill*, 11 *Ves.* 646. *Warno v. Constant*, 5 *John. R.* 135.)

If the debt and claim of the complainants was provable under the bankrupt act, and was discharged by the certificate of the defendant, then he was entitled to an order perpetually staying proceedings upon the decree, as against him personally. His discharge was as effectual, to discharge the debt, as a discharge under the two-thirds act of this state would have been; and as effectual as a release by, or payment to, the complain-



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ants. (*Deyo v. Van Valkenburgh*, 5 *Hill's Rep.* 442.) If after the entry of the decree of foreclosure, and the sale of the premises, the defendant had paid the deficiency or it had been released to him, the court would, if necessary, have stayed all proceedings upon such decree. And we suppose a payment of the mortgage, or a release of the defendant from personal liability on his bond, would have been equally effectual. The decree was entered before the discharge was obtained; and of course the defendant had no opportunity to set up his discharge in opposition to the entry of the decree. And the decree, when entered, was final. (1 *Barb. Ch. Pr.* 330.) In such a case, where the defendant has had no day in court to plead his discharge, the court will relieve him on motion. (*Palmer v. Hutchins*, 1 *Cowen's Rep.* 42. *Thomas v. Striker*, 3 *John. Cas.* 90. *Billings v. Shute*, 1 *Id.* 105. *Graham v. Pearson*, 6 *Hill's Rep.* 247.) The opinion of the chancellor in the case of *Alcott v. Avery*, (1 *Barb. Ch. Rep.* 347,) recognizes the principle for which we contend; and that this defendant is entitled to the relief he asks.

The court of chancery having jurisdiction of the subject matter, and of the parties, by the proceedings in the suit, will exercise that power, which is sometimes exercised by the supreme court in the exercise of its equitable jurisdiction, by perpetually staying the proceedings of a party upon a decree of the court, when such party undertakes, or is about to enforce, or in any way make use of such decree, in a manner illegal, oppressive, or unjust; and will not drive the party to a bill for an injunction, unnecessarily. The affidavit of Johnson does not bring this case within the decision in *Scott v. Grant*, (10 *Paige*, 485.) His affidavit is adroitly drawn, for effect. In the suit brought in the supreme court the discharge is pleaded, and the plaintiffs set up no fraud; but they rely entirely on the doctrine of a *novation* of the debt, by the decree. In order to bring themselves within the decision in *Scott v. Grant*, the complainants should have stated, on oath, their intention to contest the validity of the discharge; and then the vice chancellor might have directed an issue, or in some way have disposed of the matter. The

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decree is *prima facie* discharged by the certificate. And if the complainants desire to enforce it, why may they not be the actors by a proceeding in this court, founded on the decree; as by a petition for leave to issue execution, notwithstanding the discharge?

The vice chancellor erred in imposing the payment of costs of entering the decree, the costs of the suit in the supreme court, and the costs of opposing the motion made by the defendant, as a condition of granting relief. If we are right as to the effect of the discharge, the defendant was entitled to relief, or rather to the protection afforded him by his discharge, as a matter of right, and not as a favor. Even if we were wrong, still it was not a case for the imposition of costs, in the exercise of a proper discretion. The defendant could hardly be said to be in default for not knowing that the complainants would attempt to enforce a decree legally and equitably barred by his certificate. The complainants were irregular, also, in docketing their decree; and costs should have been granted against them. The debt was barred by the certificate. No further action of the court could be had in the premises. The docketing of the decree, like the issuing of an execution, was the irregular act of the party. The defendant could not be heard against it; and he therefore moved to set it aside, as soon as he had notice of it. The docketing of the decree was an injury to the defendant, even if there was no further action thereon by the complainant. Why make the defendant pay the costs of any proceedings in the suit? He does not seek to avoid any thing done prior to the decree, or to disturb the decree, or the proceedings under it. He only asks that the complainants may not now proceed farther upon it against him personally. Why make him pay the costs of the suit in the supreme court? That suit was unnecessary. If the decree was valid, an execution could have been issued upon it in this court. The only object of that suit was costs, or the hope that the defendant might be entrapped in some way. We therefore insist that the motion of the defendant to vacate the docket of the decree with costs should have been granted by the vice chancellor; whether any other or dif-

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ferent relief was granted or not. And we also contend, in addition to this, that the complainants should have been perpetually stayed from proceeding in this court, or in any other court, against the defendant personally, upon the decree. Or if the court understood, from the affidavit of Johnson, that the complainants intended or desired to contest the validity of the discharge, as to which there is no pretence, then the motion might have been denied, unless the defendant at once consented to a feigned issue to try the question as to the validity of the discharge. And in case an issue was awarded, the question of costs should have been reserved until the result was known. Or if the complainants declined an issue, then the motion should have been granted, with costs.

*L. Johnson*, for the respondents. I believe this is the first time that a party has had the hardihood to ask for a favor of a court, and at the same time to ask that the party at whose expense the favor is to be granted, should pay the costs of the application. But the pretence here is, that every creditor of a bankrupt is to be presumed to have certain knowledge that the bankrupt has obtained his discharge, and when he obtained it; and that it is to be also presumed that such discharge is free from all fraud, or any thing which can impeach its validity. And that in equity and good conscience the obtaining such discharge is to be considered as honestly and fairly paying such debt in gold or silver coin. Now is such the effect of a bankrupt's discharge? It is admitted that a discharge regularly and fairly obtained, under the bankrupt law, and properly interposed as a defence, either by plea or otherwise, so that those to be affected thereby may have an opportunity to test its validity, may be as available to the bankrupt as a payment of the debt. But even then it is not considered as a payment. There still remains a moral obligation to pay, which is a sufficient consideration to support a new promise. (*Scouton v. Eislord*, 7 *John. Rep.* 86. *Erwin v. Saunders*, 1 *Cowen's Rep.* 249.) Such also is the case with a debt barred by the statute of limitations. There can therefore be no moral or legal wrong in the party who seeks

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to collect what is in fact as honestly due to him as though no such defence existed. The cases are numerous where a plaintiff seeking to collect such a debt has been allowed, upon the bankrupt's pleading his discharge, to discontinue without paying costs. (*Hall v. Gordon*, 1 *How. Pr. Rep.* 99.) And this rule is without exception, even although the party thus seeking to collect his debt had the most perfect knowledge of the application for such discharge before he commenced his suit. So, even also where the defendant offered to stipulate, not to plead the discharge. But no case, I believe, can be found, in which a party seeking to recover a debt which had not been fully paid, has the defendant been relieved from the payment of costs.

The rule and course of practice in the supreme court, where relief is granted in cases somewhat analogous to this, is for the defendant to move to open the judgment, and for leave to come in and plead his discharge; and if the case be a proper one, and no laches imputable, the court will grant leave, &c. on the defendant's paying costs of entering the judgment, and of opposing the motion. (*Wolfe v. Wynkoop*, 1 *How. Pr. Rep.* 56.) Whether the defendant shall be let in to plead his bankrupt discharge, is a matter of discretion with the court. (*Hunter v. Schuyler*, *Id.* 96.) But the defendant must move for leave to plead his discharge at the first opportunity. (*Hall v. Gordon*, *Id.* 99.) In all these cases, the bankrupt was relieved on the ground, either that the judgment was obtained against him before the presenting of his petition, and the judgment was sought to be enforced by execution; so that he had no opportunity to have the validity of his discharge tested by a trial; or some step had been taken during the pending of the suit and before the discharge was granted. But I cannot find any case where the judgment or decree was actually rendered before the discharge, as in this case, in which relief has been granted at all. So that I think the vice chancellor went even further in giving relief to this defendant, than any of the cases warranted. This appeal was probably brought upon the remarks of the chancellor in the case of *Alcott v. Avery*, (1 *Barb. Ch. Rep.* 347,) that it is irregular to issue execution upon a judgment or decree

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which *prima facie* is no longer in existence, as against the defendant or his property, without previous application to the court, &c. But it seems to me that this is sufficiently answered by the vice chancellor in his opinion in this case. Besides, the bringing of a suit on the judgment or decree, as in this case where the defendant has an opportunity to set up his discharge as a defence and have the validity of it fully tested, may be considered as the previous application to the court upon notice; as mentioned by the chancellor in *Alcott v. Avery*. For if the debt or decree for the deficiency was fully discharged and satisfied by the bankrupt's discharge, so that the complainants have no right to recover in the suit at law, then there could be no occasion for this motion. For the defendant might safely plead the discharge at law, and defeat the recovery there.

THE CHANCELLOR. The decree in this case was undoubtedly irregular, as the assignee in bankruptcy was not brought before the court. And if the defendant was personally liable for the deficiency after his discharge subsequent to that decree, and if he had applied within a reasonable time after he had notice of the entry of a decree for the sale of the mortgaged premises, he would have been entitled to have such decree set aside. As I understand the case, the title to the equity of redemption in the mortgaged premises, was in Fitzhugh at the time of the filing of the bill in this cause, and he and his wife alone were made parties to the suit; but before the decree, and even before the bill was taken *pro confesso* against them, Fitzhugh was declared a bankrupt, by a decree of the district court. The effect of that decree was to vest in the assignee in bankruptcy the whole interest, of both defendants, in the mortgaged premises, except the inchoate right of dower of Mrs. Fitzhugh in the equity of redemption. And as the assignee in bankruptcy had not been made a party to the suit, as he should have been after the decree in bankruptcy had been entered, the decree of foreclosure and sale was a mere nullity as to him; and it could not foreclose his equity of redemption in the mortgaged premises. The effect of such an erroneous proceeding would necessarily

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ne to prevent bidding at the sale made by the master. For a purchaser would not get a perfect title to the mortgaged premises under such a decree. The proper course for the complainants, after the decree in bankruptcy, which vested the title to the equity of redemption in the official assignee, was to file a supplemental bill in the nature of a bill of revivor, to revive and continue the proceedings against such assignee, as the party upon whom the title to the equity of redemption had been cast by operation of law. Had that been done, the mortgaged premises could properly have been sold under the decree, so as to give a perfect title to the purchaser; and the bankrupt would have been rightfully charged with the deficiency if he should not succeed in obtaining his discharge, so as to exempt him from personal liability.

I am satisfied, however, that the defendant Fitzhugh has no interest in this question; if his affidavit is true, that he has been fairly and legally discharged from his debts, subsequent to the entry of the decree in this cause. Where a decree is actually made before the discharge of the defendant, under the bankrupt act, for the payment of a debt which was contracted before the proceedings in bankruptcy were instituted, such debt may be proved under the proceedings in bankruptcy. And the discharge of the defendant is a complete and perfect bar to any suit, or other proceeding, upon the decree, to charge the defendant personally with the debt; unless the discharge can be successfully impeached, for some of the causes specified in the bankrupt act. The language of Mr. Justice Bronson, in the case of *Thompson v. Hewitt*, (6 *Hill*, 254,) that the original debt was merged and extinguished by the judgment, must be confined to the case then under consideration. There the debt and costs for which the judgment was entered did not exist at the time of the presenting of the petition in bankruptcy. The plaintiff was claiming a debt, the existence of which was disputed by the defendant. And, as a compromise, it was agreed between the parties that a cognovit should be given, for a certain specified sum, upon which the plaintiff might enter up his judgment; and with an express understanding that any discharge which the defendant might thereafter obtain, under the proceedings in bankruptcy

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which had previously been instituted, should not affect the judgment for the new debt thus created by the compromise. In ordinary cases however, although a judgment technically changes the nature of the debt, it is still in fact the same debt which was due at the commencement of the suit; and if contracted previous to the institution of the proceedings in bankruptcy it will be barred by the discharge, where such discharge is obtained subsequent to the entry of the judgment.

The mere entry of the decree in this case in the docket of the clerk could not affect the rights of the defendant, in any way. Previous to the adoption of the revised statutes, a rule of this court required the register and assistant register to docket all enrolled decrees, in the manner in which judgments were docketed in the supreme court; not for the purpose of making the decree a lien upon the real estate of the party, but as a matter of reference, to facilitate searches. The revised statutes authorized the docketing of all enrolled decrees directing the payment of any debt, damages, costs, or other sum of money; and made such decree, when docketed in the manner prescribed by the statute, a lien upon real estate. But in addition to the docket which had formerly been kept, pursuant to the rule of the 5th of May, 1825, the revised statutes required a transcript thereof to be sent by the register, or the assistant register, or clerk, with whom the decree was enrolled, to each of the clerks of the supreme court; to be entered in the docket of judgments in their offices respectively. (2 R. S. 182, § 95.) The statute having rendered the rule of May, 1825, unnecessary, it was left out on the revision of the rules which went into operation on the first of January, 1830, and in subsequent revisions. The act of May, 1840, concerning costs and fees in courts of law and for other purposes, (*Laws of 1840, p. 334,*) afterwards dispensed with the necessity of docketing judgments or decrees, either in the offices of the registers and clerks of this court, or with the clerks of the supreme court; and only required them to be docketed in the offices of the clerks of the counties where the premises were situated, in order to make them liens upon real estate. But as it was most convenient, for the purpose of giving the transcript

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required by the act of May, 1840, to enter the docket of the judgment or decree in their own books in the first place, it has, I believe, been the practice of the officers of this court, as well as of the supreme court, since that time, to docket the judgment or decree in the books of their own offices in the first instance; although it is no longer necessary to do so, and does not affect the rights of either of the parties to the judgment or decree. As this entry of the substance of the decree in the docket of the clerk of this court, therefore, was merely for the convenience of the clerk, to enable him to make a transcript of the decree to be docketed if such transcript should thereafter be required, and could not cast a cloud upon the title of Fitzhugh to real property any more than the enrolled decree itself could, he had no right to apply to have it set aside.

His proper course is to plead his discharge in bar of the suit at law upon the decree; inserting in his plea the proper averments to show that the debt, for the payment of which that decree was made, had been contracted before the presenting of his petition in bankruptcy, so as to be provable under the proceedings in bankruptcy, and affected by the discharge which was granted subsequent to that decree. The order appealed from does not deprive the appellant of the right to make this defence in the suit at law, upon the decree, but merely gives him the right to litigate the question of the validity of his discharge upon a supplemental bill in this court, if he elects to proceed in that manner. The complainants, perhaps, might have appealed from the order, upon the ground that the applicant had no right to any relief in this court; and that they had the right to a jury trial, in a court of law, upon the question of the supposed fraud in obtaining the discharge. But the order is not erroneous as to the appellant. It must therefore be affirmed, with costs.



THE LADY SUPERIOR OF THE CONGREGATIONAL NUNNERY  
OF MONTREAL *vs.* McNAMARA and others.

A deed may be delivered to a stranger, for the grantee named therein, without any special authority from the grantee to receive it for him. And if the grantee assents to it, afterwards, the deed is valid from the time of the original delivery. Such assent will be presumed, from the beneficial interest of the grantee in the deed, unless a dissent is proved.

Where the payee of a bond and mortgage, given for the benefit of a third person, has consented, beforehand, to take such bond and mortgage for the purpose of assigning them to the person whose debt is intended to be secured thereby, it is not necessary that any particular formality should be observed in delivering the instruments and obtaining his assignment thereof. Placing them before him, for his signature to the assignment, is a good delivery; and his executing such assignment is an absolute acceptance by him of the bond and mortgage.

The delivery of the assignment to the mortgagor, for the benefit of the assignee, is also a good delivery of the assignment, to the latter, by the mortgagee. And the bringing of a suit by the assignee to foreclose the mortgage, as such assignee thereof, is an assent to the assignment; and relates back to the time when such assignment was delivered to the mortgagor for the benefit of the real party for whose security the mortgage was given.

It is not a valid objection to an assignment of a bond and mortgage, especially in a court of equity, that the assignee is not described therein by name. It is sufficient if the assignment is made to a person in a particular character sustained by him; provided the description identifies the assignee with as much certainty as if he had been described by name.

Where a deed is delivered to a third person, without any authority from the grantee, who refuses to accept or ratify the deed, such delivery is invalid.

THIS case came before the chancellor upon an appeal, by E. Wolcott, one of the defendants, from a decree of the late vice chancellor of the eighth circuit. The bill was filed by the Sister Frances Huot, also called, or named, St. Gertrude, the Lady Superior of the Congregational Nuns at Montreal, in Canada East, to foreclose a mortgage; and the facts in the case, as they appeared by the pleadings and proofs, were substantially as follows:

P. J. McNamara of Rochester, in the county of Monroe, being indebted to the ladies of the Congregational Nunnery in Montreal, for the board and education of his daughters, and having received a letter from their agent at Montreal, urging him to

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pay or secure the debt without delay, called upon P. G. Buchan to draw a bond and mortgage, upon certain real estate of McNamara in Rochester, to be given to them. Buchan suggested that if the bond and mortgage were given directly to the ladies of the nunnery there might be a difficulty in obtaining an acknowledgment of satisfaction so as to have the mortgage cancelled on the records, after it should have been paid. He therefore proposed that McNamara should get some person in whom the ladies of the nunnery would have confidence, to take the mortgage in his own name, for their benefit, and then to assign it to the lady superior of the nunnery, by an assignment which should not be recorded ; so that the nominal mortgagee could acknowledge satisfaction of the mortgage when the debt should have been paid. McNamara accordingly called upon J. Allen of Rochester, who consented to take the bond and mortgage in his own name, and to make an assignment thereof to the lady superior of the nunnery ; in conformity with that suggestion. The bond and mortgage were accordingly executed by McNamara and wife, and duly acknowledged and recorded, on the 27th of July, 1840. And Allen, on the same day, whether before or after the recording of the mortgage did not appear, upon the same being presented to him, executed an assignment thereof under his hand and seal, and endorsed upon the mortgage, assigning the bond and mortgage to the complainant, and immediately delivered the papers to McNamara for the assignee. Buchan also wrote a letter to the agent of the ladies of the nunnery at Montreal, and delivered it to McNamara to be forwarded to him with the papers, explaining the reason why the papers were executed in that form ; stating also that the property mortgaged was ample security for the debt, and that Allen was a gentleman of wealth and integrity. There was no direct evidence of the time when the bond and mortgage and assignment were sent to the ladies of the nunnery, or their agent at Montreal. But after they became due and payable, they were sent by mail from the lady superior at Montreal to the Rev. B. O'Riley, at Rochester, to be delivered to a lawyer there for collection ; with a formal power of attorney, from her

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to such attorney, to collect the amount due, &c. and acknowledged before the mayor of Montreal.

Soon after the giving of the bond and mortgage, the appellant E. Wolcott recovered a judgment against the mortgagor. And in March, 1841, the mortgaged premises were sold by the sheriff, under an execution upon that judgment, and were purchased by the defendant Wolcott, who received the sheriff's deed therefor in June, 1842. The bill was taken as confessed against McNamara and his wife; but E. Wolcott put in an answer alleging that there was no such person in existence as the complainant, and that the bond and mortgage were given to Allen to defraud Wolcott as a creditor. But no evidence was adduced to establish the alleged fraud. Wolcott's solicitor also stipulated to admit, upon the hearing, that at the date of the mortgage, and ever since, the complainant was a real person. And that at the time of the date of the bond and mortgage and of the assignment thereof she was, and ever since had been, the lady superior of the Congregational Nunnery at Montreal, and as such authorized by the laws of Canada to sue for, collect, and receive debts due to the nunnery; but that the complainant was not a citizen of the United States, but an alien.

The vice chancellor made the usual decree for the foreclosure of the mortgage and the sale of the mortgaged premises, for the payment of the amount due to the complainant upon the bond and mortgage.

*S. Boughton*, for the appellant.

*C. M. Lee*, for the respondent.

THE CHANCELLOR. The execution of the bond and mortgage to Allen, under the circumstances disclosed in this case, constituted him a trustee for the ladies of the nunnery whose debt was intended to be secured thereby; so that if he had neglected to execute the assignment pursuant to the arrangement, or if, for any reason, the assignment executed by him was technically invalid, such bond and mortgage would still have cre-

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ated a lien upon the mortgaged premises from the time of the recording of the mortgage. And a court of equity would have compelled Allen either to execute a valid assignment of such bond and mortgage, or would have decreed a foreclosure thereof for the benefit of those whose debt was intended to be secured thereby. The delivery of the bond and mortgage to Allen, the nominal mortgagee, to enable him to execute the assignment endorsed upon the mortgage, was a sufficient delivery to, and an acceptance thereof by Allen, to give effect to those instruments; especially when the mortgage was acknowledged by the mortgagor and put upon record for the purpose of giving effect to it as a valid security. A deed may be delivered to a stranger, for the grantee named therein, without any special authority from the grantee to receive it for him. And if the grantee assents to it afterwards, the deed is valid from the time of the original delivery. *Omnis ratihabitio retro trahitur et mandato seu licentia equiparatur.* (*Wing. Max.* 485.) It is upon this principle that it has frequently been held that a delivery of a deed to the proper recording officer to be recorded, if intended to vest the title immediately or absolutely in the grantee, either as a trustee or otherwise, is a valid delivery; if not afterwards dis sented from by the grantee. (*Tompkins v. Wheeler*, 16 *Peters' Rep.* 106. *Ingram v. Porter*, 4 *McCord's Rep.* 198. *Dawson v. Dawson*, *Rice's Eq. Rep.* 244.) Here the nominal mortgagee, Allen, had consented beforehand to take the bond and mortgage for the purpose of assigning them to the complainant. It was not necessary, therefore, in consummating the arrangement, that any particular formality should be observed at the time the bond and mortgage were presented to him to obtain his assignment thereof. For the placing them before him to obtain his signature to the assignment was a good delivery, and his signature to the assignment was an absolute acceptance by him. The delivery of the assignment to McNamara, for the benefit of the complainant, was also a good delivery of the assignment to her, unless she dissented; of which there is no pretence in this case. And the act of bringing this suit to fore close the bond and mortgage, as the assignee thereof, was of itself

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an assent to the assignment to her ; and relates back to the time when such assignment was delivered to McNamara for her benefit. Besides, there is in this case evidence from which it may fairly be inferred that the bond and mortgage, with the assignment, were transmitted to the agent of the ladies of the nunnery at Montreal, and received by the complainant immediately after their execution.

But even if the complainant had never heard of this bond and mortgage and assignment until after the recovery of the appellant's judgment against McNamara, it would not have altered her legal and equitable rights in this case. For the absolute delivery of the bond and mortgage to Allen, in trust to assign the same to her, and the delivery of the assignment to McNamara for her use, vested the title thereof in her immediately on such delivery of the assignment, although it was delivered to the mortgagor. For if he had afterwards refused to deliver this assignment to her she might have compelled its delivery by suit. The cases of *Doe, ex dem. Garnous, v. Knight*, (5 Barn. & Cress. 671,) and of *Church v. Gillman*, (15 Wend. Rep. 656,) are directly in point to show that a deed absolutely delivered to a third person, for the use of the grantee, is a present deed and takes effect from the time of such delivery, although such third person was not authorized by the grantee to receive it ; if such grantee afterwards assents to it. Such assent will also be presumed from the beneficial interest of the grantee or obligee in the deed, unless a dissent is proved.

Some of the earlier cases on this subject went even so far as to declare that the delivery of the deed to a stranger, for the use of the grantee, made it a good deed *in presenti*, although the grantee refused to accept it when offered to him by such third person. (*Taw, executrix, v. Bury, Anderson's Rep.* 4; 2 *Dyer*, 167, b, *S. C.*) But it was afterwards held, that where a deed was delivered to a stranger who had no authority to receive it for the grantee, and such grantee refused to receive it, the delivery was invalid, and the deed lost its force. (See *Butler and Baker's case*, 3 *Coke's Rep.* 26, b ; *Whelpdale's case* 5 *Idem*, 119, b ; and *per Holt, C. J.*, 1 *Salk.* 307.)

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It is no valid objection to this assignment, especially in this court, that the complainant was not described therein by name. It is admitted that at the time of the execution of the bond and mortgage, and the assignment, she was the lady superior of the Congregational Nunnery of Montreal, and authorized by the laws of Canada to receive and collect the debts due to the ladies of that institution. An assignment to her by that description identified the assignee with as much certainty as if she had been described by her name. In the case of *Shaw and others v. Loud*, (12 Mass. Rep. 447,) where a bond and mortgage had been given to the plaintiffs by the description of the heirs at law of John Tyrrel, without mentioning any of their names, he being dead at the time of giving such bond and mortgage, the court held the securities to be valid. And Chief Justice Parker, who delivered the opinion of the court, says a deed made to *the heirs at law*, of a deceased person, is good; because the persons who are to take can be ascertained by extrinsic testimony. In the case of *Stromour v. Rottenbury*, (4 Dess. Rep. 268,) the court of chancery in South Carolina held that a deed of slaves, to the grantees therein, by no other name than that of the grandchildren of the grantor by his daughter Catherina, was valid, and conveyed the property to her children who were in esse at the time of the execution of the deed. And a similar decision was made in the case of *Hagg and wife v. Odom*, (*Dudley's Geo. Rep.* 185;) where the grantees were not named by the grantor, but were described as *the children of Nancy Jones*. But a grant to an individual named, and his associates, appears to be too uncertain and in definite to convey any thing to others than the individual named in the deed. (*Duncan v. Beard*, 2 Nott & McCord's Rep. 400.)

There is no foundation for the suggestion that McNamara intentionally gave the bond and mortgage for more than was actually due, for the purpose of defrauding his creditors. The admission of the indebtedness by McNamara, at the time of the giving of the bond and mortgage, as the same was stated in the letter to him from the agent of the ladies of the nunnery at Montreal, and the execution of those securities for that amount

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was sufficient evidence of the indebtedness, not only against the mortgagor but also as against the appellant who claimed under him, through the subsequent judgment. The stipulation of the appellant to admit that a certain sum was due, was not an admission on the part of the respondent that the whole amount mentioned in the bond and mortgage was not actually due. Her counsel, therefore, if he had thought proper, might have claimed the whole sum secured by the bond and mortgage, with interest thereon. But as the complainant only asked for a decree for the smaller sum mentioned in the stipulation given by the adverse party, the probability is that some mistake had occurred in stating the account, or in reducing the Canada currency, in which the account was stated in the letter of the agent, into dollars and cents. Such an error, however, if it occurred, would not render the deed fraudulent.

There is therefore no error in the decree appealed from, and it must be affirmed with costs. And if the proceeds of the mortgaged premises, upon a sale thereof under the decree, should not be sufficient to pay the amount due upon such decree and the costs, together with the expenses of the sale, the appellant must pay to the respondent the value of the rents and profits of the mortgaged premises during the time the sale has been suspended by this appeal, or so much of the value of such rents and profits as may be necessary to pay the deficiency; as the respondent's damages for the delay and vexation caused by such appeal. And the respondent is to be at liberty to apply for a reference to ascertain the amount of such damages, if necessary.

WRIGHT and others *vs.* E. W. MILLER and others.H. MILLER *vs.* WRIGHT and MILLER.

A decree setting aside proceedings, by which the real estate of a feme covert had been transferred from the trustee of the estate and vested in her husband, as being fraudulent and void as against the children of the feme covert; directing a reference to a master to ascertain the value of those portions of the trust estate which have been sold by the husband to bona fide purchasers, and what sum, if any, should be paid by him to reimburse the trust estate, and to report a proper person and appoint him as trustee; and giving all the consequential directions, so as finally to dispose of the whole case upon the coming in and confirmation of the master's report, by a common order in the clerk's office, without the necessity of bringing the cause again before the court for any other decree, or further directions, and which also disposes of the question of costs, is a final decree.

Serving notice of an appeal from such a decree, and giving the ordinary appeal bond, in the penalty of \$250, for the costs and damages of the respondent upon the appeal, will operate as a stay of all the proceedings upon the decree appealed from, except the proceedings for the costs, directed to be paid by the appellant.

Except as to the costs, such a decree is not a decree for the payment of money, within the intent and meaning of the 82d section of the article of the revised statutes relative to appeals; so as to make it necessary for the appellant to give security to pay the amount decreed, before the coming in and confirmation of the master's report showing that money is to be paid.

The case is different where the decree directs the payment of costs, but which have not been taxed, or directs the payment of the amount due upon a bond and mortgage, which is a matter of mere computation, upon the coming in and confirmation of the report as to such amount.

Where a final decree directs the appointment of a new trustee, and a conveyance to such new trustee when appointed, if the decree is not appealed from until after such trustee has been actually appointed, the appellant must comply with the provisions of the 83d and 84th sections of the article of the revised statutes relative to appeals, if he wishes to make his appeal a stay of proceedings.

THIS was an appeal, by E. W. Miller, one of the defendants, from an order of the late vice chancellor of the first circuit, directing the master to proceed in the decree which had been made in these causes. By the original decree, certain proceedings, by which the real estate of Mrs. Miller, which, previous to her marriage, had been conveyed to a trustee for her separate use during coverture with remainder in trust for her children, had been transferred from the trustee and vested in E. W. Mil



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let the husband, absolutely, were set aside as fraudulent and void, as against the children of Mrs. Miller; and a new trustee was directed to be appointed. The decree also directed a reference to a master to ascertain the value of those portions of the trust estate which had been sold by E. W. Miller to bona fide purchasers, and what sum should be paid by him to reimburse the trust estate; and to report a proper person and appoint him as the new trustee. The decree further directed that E. W. Miller should convey to such trustee the part of the trust property mentioned in such decree; and that upon the coming in and confirmation of the master's report E. W. Miller should pay the amount which should be reported to be necessary to reimburse and make good the trust estate. The substance of the decree is more fully stated in the report of the case before the assistant vice chancellor. (1 *Sand. Ch. Rep.* 103.)

E. W. Miller appealed from the decree, and gave the usual appeal bond, in the penalty of \$250, for the costs and damages of the respondents upon the appeal; and served notices of such appeal upon the clerk of the court, and upon the solicitors of the adverse parties. But he gave no other security, and took no other steps to make the appeal a stay of the proceedings upon the decree appealed from. In June, 1845, the respondents carried the decree into the master's office, and obtained a summons to E. W. Miller to appear before him, to proceed upon the reference. The appellant attended, upon the return day of the summons, and objected that the appeal stayed all proceedings upon the decree appealed from; and the master decided that the objection was well taken, and declined to proceed. The respondents subsequently applied to the vice chancellor and obtained the order, which was now appealed from, directing the master to proceed to the appointment of a new trustee, &c.

*B. W. Bonney*, for the appellant. The 116th rule of this court prescribes, that on appeals from a vice chancellor to the chancellor, the bond shall be the same as on appeals to the court of errors, and that the provisions of sections 80 to 89 of title 3, chapter 9 part 3. of the revised statutes shall be appli-

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able. (*See 2 R. S. 605, §c. ; 2d ed. p. 502 ; 3d ed. p. 696.*) By section 80, it is provided, that an appeal shall not be effectual for any purpose until a bond for costs has been given, or a deposit of \$250 made. And by section 81, that no deposit shall be required when a bond is given. In this case a bond for costs has been duly executed, approved and filed, and no objection is made to it. Section 82 provides, that if the decree direct the payment of money, the appeal shall not stay the issuing of execution or other process to enforce the decree, &c. unless a bond be given in the penalty of at least double the sum decreed to be paid, conditioned, &c. This section is not applicable to the present case : no amount is decreed to be paid : it is not determined that any thing is due by the defendant. On the contrary, his affidavit (uncontradicted) shows the estate indebted to him. Besides, the question is not whether execution shall issue, but whether the master shall proceed to appoint a trustee and take an account. Section 83 of the statute relates to a decree directing the assignment or delivery of securities, chattels, &c. and in no way applies to this case. Section 84 provides, that if the decree directs the execution of any conveyance or other instrument, the issuing and execution of process to enforce it shall not be stayed until the appellant shall have executed the same and deposited it with the register or assistant register, &c. This section does not apply to the present case. The defendant Miller cannot execute a conveyance of the premises, for want of a grantee. Besides, as before mentioned, the question is not whether the defendant shall be compelled to execute a conveyance, (that he has not been asked to do,) but whether the master shall proceed to appoint a trustee and take an account. Section 85 provides, that if the decree direct the sale or delivery of the possession of real property, the issuing and execution of process to enforce the same shall not be stayed until a bond be given, &c. In the present case there can be no delivery of possession, as there is no person to whom it can be delivered, and no execution or process to compel such delivery is sought to be stayed, or has been attempted to be issued. Section 89 provides, that in all other cases the filing and per-

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fecting an appeal by giving bond for costs shall stay all proceedings on the order or decree appealed from, (except in three specified cases, neither of which is this case.) The present is one of those other cases in which proceedings are stayed, and were intended to be stayed, by the giving of a bond for costs only. That part of the decree under which the complainants seek to proceed, (notwithstanding the appeal,) orders a reference to a master to appoint a trustee and to take an account for the purpose of ascertaining what (if any thing) is due from the defendant Miller to the estate. This reference, requiring an account extending over a period of nearly thirty years, will necessarily, (if proceeded with,) involve great labor and expense, to which it was not the intention of the legislature to subject a party who in good faith appealed. Such appeal has in this case been taken, and it stays all proceedings before the master. There is no pretence of any special necessity for proceeding in this case. It is not alleged, nor can it be, that the defendant Miller is wasting or injuring the property, or that he is not abundantly able to pay any amount in which he can be found indebted to the estate. The papers now before the court show him a creditor of the estate. If the chancellor shall be of opinion that a further bond is necessary to stay the proceedings in the master's office, such bond may yet be given, and from that time the proceedings will be stayed. The amount of the penalty of the bond should be fixed by the court. (2 R. S. 503, § 85. *Burr v. Burr*, 10 *Paige*, 166) The order made by the vice chancellor should be reversed, and the motion of the complainants denied with costs.

*A. W. Bradford & J. A. Lott*, for the respondent. The complainants were at liberty to proceed before the master, and the order appealed from, directing the master to proceed, is correct. (1.) Because the decree directs the execution of deeds of conveyance of real estate, (2 R. S. p. 605, § 84.) (2.) Because the decree directs the delivery of possession of real estate. (2 R. S. p. 605, § 85.) (3.) Because it is in the discretion of the court to allow an account to be taken before an appeal is disposed of,

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on requiring sufficient security to save the appellant harmless in case he succeeds in reversing or modifying the decree. (*Mc Geoch v. Bullions*, 2 Barb. Ch. Rep. 34.) (4.) The "issuing and execution of process to enforce the decree," includes process by summons in a master's office, where such process is a necessary means to execute the decree. When in this case, therefore, the master shall have appointed a trustee, which he may do, without requiring the defendant Miller first to account, the complainants will have a right to require the execution of the conveyances and delivery of the possession to the trustee. The decree has not been stayed in any particular. It is an insufficient excuse for the appellant to say he could not find a grantee to whom he might convey and deliver possession. It was in his power, at any moment, to compel the complainants to have the trustee appointed and a grantee named, so as to enable him to perfect his appeal within the requisite period, and obtain a stay of further proceedings by complying with the provisions of the statute, in executing the conveyances, and giving the proper bonds. (*Burr v. Burr*, 10 Paige, 167, 170. *Quackenbush v. Leonard*, 10 Id. 133, 137.) If these points be well taken, the court will not, at this stage of the case, aid the appellant in staying the execution of the decree, until the trustee is appointed and the conveyances of the property made. For the complainants have a right to elect to take a deed of the farm at Flushing, and if they do so, bonds must be given for the rents of that farm also. As to the allegation that there is no special necessity for proceeding in this case, for the reasons advanced by the appellant; the complainant shows in his affidavit that the rents are in danger. It does not appear, even from his own showing, that the appellant is a creditor of the estate, for he is held to account for the *present* value of the original trust estate; and expenses for its permanent improvement, included in his account, are supposed to have been compensated by its increased income. In any event, it cannot be that in all cases of trust estates, where from there being no trustee in esse, there is no person to receive the conveyance and possession of real estate as decreed, except through the inter

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vention and appointment of a master, that an appellant can escape the requisitions of the statute, and continue in the enjoyment and possession of the property declared to belong to others, merely by bringing his appeal and filing the ordinary bond for costs.

THE CHANCELLOR. The only question which it appears to be necessary to consider is, whether the notice of the appeal, and the giving of the bond of \$250 for the costs and damages upon the appeal, operated as a stay of the proceedings upon the decree appealed from. For if it did not, this does not appear to be a proper case in which to proceed and take the accounts, directed by the decree, pending the appeal, and before a new trustee has been appointed.

Had this been an interlocutory decree, the second clause of the 116th rule of this court would have applied to the case, and the proceedings would have been stayed by the appeal, without a special order of the appellate court, or the giving of a further bond. (*Williamson v. Field*, 2 Barb. Ch. Rep. 281.) But it is clearly a final decree, according to the decisions. For it gives all the consequential directions, so as finally to dispose of the whole case upon the coming in and confirmation of the master's report, by a common order in the clerk's office; without the necessity of bringing the cause again before the court for any other decree or further directions. And it also disposes of the questions of costs. (*Coit v. Crane*, 1 Barb. Ch. Rep. 21. *Johnson v. Everitt*, 9 Paige's Rep. 639. *Mills v. Hoag*, 7 Id. 19.) The first clause of the 116th rule of the court, therefore, leaves the question as to the stay of proceedings pending the appeal to depend upon the provisions of the sections of the revised statutes referred to in that rule; except as to the justification of the sureties in the appeal bond, as provided for expressly in the rule itself.

The decree appealed from not only sets aside the fraudulent contrivances by which the legal title of the trustee in the trust estate was divested, and such legal title transferred to this appellant, but it directs the appointment of a new trustee, and

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a transfer of the legal title to him, as well as the delivery of the possession. And if the part of the decree which directs the appointment of a new trustee had not been appealed from, or if such new trustee had been actually appointed before this appeal was perfected, the appellant would unquestionably have been compelled to comply with the provisions of the 84th and 85th sections of the article of the revised statutes relative to appeals from the court of chancery, to have stayed the proceedings to compel the execution of the deed to the trustee, and the delivery of the possession to him. (2 R. S. 606.) Even in that case, however, the conveyance of the Flushing farm, and the delivery of the possession thereof, could not have been compelled until after the taking of the account directed by the decree. For until such account had been taken it could not be known whether that farm was to be conveyed to the new trustee, and the possession thereof delivered to him, or whether he was to have a mere lien thereon, for the amount due to the trust estate, if any sum should be found necessary to reimburse the trust estate, for the losses it might have sustained by the wrongful act of the appellant.

But as no trustee has been appointed, and E. W. Miller appeals from the part of the decree directing a new trustee to be appointed, there is no person to whom the appellant can execute the deed and deposit it with the clerk, to abide the event of the appeal, as required by the 84th section of the statute. It is true the appellant might have waited until a new trustee was appointed. But that he was not bound to do. For it might, and probably would, vest the legal title, to a part of the trust property, at least, in such new trustee, under the provisions of the revised statutes; and thus enable the latter to recover the possession of the property at law, notwithstanding the appeal.

The appellant could unquestionably have given the security to the adverse party, that no waste should be committed upon the premises pending the appeal, and that he would pay the value of the use and occupation of the premises in the mean time to the new trustee when appointed, in case the appea

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was unsuccessful. But his neglect to comply with the provision of the revised statutes on that subject, does not prevent the appeal from staying the appointment of a new trustee. And there is no way, therefore, in which the respondents can enforce a compliance with that part of the decree pending the appeal; although the appellant neglects to give the security required.

The respondents were entitled to security for the costs awarded to them, in order to stay the collection of the costs which the appellant was directed to pay. (*City Bank v. Bangs*, 4 *Paige's Rep.* 285.) But the neglect of the appellant to give security for the payment of the costs awarded by the assistant vice chancellor would not prevent the appeal from operating as a stay of the proceedings as to other parts of the decree appealed from. And as a matter of expediency it may not be advisable for the respondents to tax their costs, and attempt to collect them, in this stage of the proceedings. For as there cannot be separate taxations, and separate executions, for different portions of the same bill of costs, where the decree makes no provision therefor, the taxation and collection of the costs which have accrued up to this time would probably deprive the solicitor of the complainants, in the first of the above causes, of the costs upon the reference.

Except as to the costs, this is not a decree for the payment of money, within the intent and meaning of the 82d section of the statute, so as to make it necessary to give security to pay the amount decreed, before the coming in and confirmation of the master's report showing that some money is to be paid. It is not a decree directing the payment of money absolutely; and merely referring it to the master to compute the amount due. For if the value of the trust property which remains, in specie, with the permanent improvements made thereon by the appellant, is equal to, or greater than what the present value of the whole trust property would have been, at this time, if the fraudulent destruction of the trust had not taken place, including that part of the rents and profits which ought to have been accumulated for the children, then no money whatever is directed to be paid to the master for the new trustee. Or if the loss which the

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trust estate has sustained is just equal to the value of the Flushing farm, and the respondents elect to have that farm conveyed to the new trustee to make up such loss, then there is nothing to be paid by this appellant except the costs of the complainants in the first suit; including the costs of the reference and the proceedings subsequent to the decree. It was therefore impossible to ascertain, at the time of appealing, whether any, or if any, how much money would be payable under the decree. And to require the appellant to give security in double the amount that upon a certain contingency might become payable under this final decree, to make the appeal a stay of the proceedings, would be to deprive him of the possibility of staying the proceedings. The case is different where the decree directs the payment of costs which have not been taxed, or the payment of the amount due upon a bond and mortgage, which is a matter of mere computation. (*Coit v. Crane*, 1 Barb. Ch. Rep. 21.) For these reasons, I think this is a case in which the giving of the ordinary appeal bond stayed all proceedings upon the decree appealed from, except the proceedings for the costs which the appellant was directed to pay; and that the master was right in declining to proceed with the reference before the appeal was disposed of by the appellate court.

There are many cases in which the revised statutes authorize appeals without any adequate security for the eventual performance of the decree appealed from, if it shall not be found to have been erroneous, or for the payment of the damages caused by the appeal; the necessary effect of which is that appeals are often brought for the mere purpose of delay and vexation. And the rule of this court relative to the security to be given upon appeals from decrees of vice chancellors, has not required any security in such a case as this, other than the ordinary appeal bond in the penalty of \$250. If the appellant is really insolvent, therefore, the remedy of the respondent is by an application for the appointment of a receiver of the rents and profits of the trust property pending the appeal, and for an injunction to restrain the appellant from receiving such rents. But



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upon the papers before me the respondents have not made out a case entitling them to such relief.

The order appealed from must be reversed, and the application to direct the master to proceed in the reference, denied; but without costs to either party.

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BELL and McLACHLAN vs. HUNT and others.

A bill of interpleader may be filed whenever it is a matter of doubt to which of the defendants the fund in the complainant's hands actually belongs, so that he cannot safely pay it to either.

Who are proper parties to a bill of interpleader.

Where the holder and owner of a bill of exchange is declared a bankrupt, and it is a matter of doubt whether such bill was not within the jurisdiction so as to pass to the assignee in bankruptcy, except as to bona fide holders thereof without notice, the drawer of the bill, who is liable to pay the same to the rightful holder and owner, may file a bill of interpleader against the different claimants of such bill to compel them to settle the right to the same between themselves.

THIS was an appeal, by J. H. Hazard and John Speer, from an order of the late vice chancellor of the first circuit, overruling their several demurrers to the bill of complaint in this cause.

Robert C. Bell, a British subject and a merchant, then domiciled at Quebec, a few days previous to the 21st of November, 1844, committed an act of bankruptcy and fled to the United States, bringing with him something more than £500 sterling, in the bills of different Canada banks; most of which were the bills of the Bank of British North America at Montreal. He applied to the complainants, at their counting room at New-York, under a fictitious name, and sold them the Canada bills, and took from them, in part payment, their bill of exchange upon a banking house in London for £500 sterling; which bill was made payable to the defendant J. Speer, of Belfast in Ireland, a brother-in-law of R. C. Bell; and was sent to him for collection. Soon after the making of the bill of exchange, an agent of the Bank of British North America arrived at New

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York, claiming that the Canada bills which R. C. Bell, under an assumed name, had sold to the complainants, had been fraudulently obtained, and that they belonged to the said bank; and giving notice to the complainants not to pay the bill of exchange, or the price thereof, to R. C. Bell. The complainants thereupon wrote to the banking house in London upon whom the bill of exchange was drawn, not to accept or pay the same; and acceptance was consequently refused. In the meantime a commission of bankruptcy was issued against R. C. Bell in Canada, dated the 10th of December, 1844, for an act of bankruptcy committed before he left Canada and previous to the purchase of the bill of exchange. And on the 31st of the same month the defendant Weston Hunt, residing at Quebec, was appointed the assignee in bankruptcy of all the estate and property of R. C. Bell. He thereupon gave notice to the complainant of the proceedings in bankruptcy and of his appointment as assignee; that he claimed that the bill of exchange, at the time of such appointment, was the property of R. C. Bell, and was in the hands of the latter, or of his agents, in some part of the united kingdom of Great Britain and Ireland, and that the title to the same became thereby vested in Hunt, as such assignee, by virtue of the proceedings in bankruptcy. Payment of the bill was afterwards demanded of the complainants, by an individual who claimed to hold it as the agent of Bell, who was then said to reside in the state of Indiana. And a suit was subsequently brought against them by the defendant J. H. Hazard in his own name, but as he alleged as the agent of, or for the benefit of, the defendant Speer, the original payee of the bill of exchange. The complainants thereupon filed their bill of interpleader in this suit, against Hunt, the assignee in bankruptcy, Hazard, the plaintiff in the suit at law upon the bill, Speer, the payee of the bill, and Bell, who claimed title to it by his agent, to compel them to interplead and settle their rights as to such bill of exchange between themselves.

*A. Taber*, for the appellants. As a bill of interpleader this bill cannot be maintained; because it does not show a title to

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the bill of exchange in two distinct claimants, each of whom is capable of interpleading. (2 *Story's Eq.* 118, § 812. *Story's Eq. Pl.* 239, §§ 294, 297.) The bill shows that the claimant Hunt is assignee only by force of a foreign bankrupt law, and can have no title to the bill, which is property within the state of New-York, beyond the reach of English laws. (*Abraham v. Plestoro*, 3 *Wend.* 538. 5 *Cranch*, 289. *Story's Conf. of Laws*, 346.) A foreign assignee cannot interplead in our courts. (23 *Wend.* 90. 11 *John.* 488.) The bill also shows that this assignee claims without right; for that the fund belongs to the British and North American Bank of Montreal, and is claimed by an agent of that bank. Nor will a court of equity, under the circumstances of this case, turn this property into a general fund for the benefit of general creditors.

The bill also prays for a discovery from these defendants; but it shows no such interest in the complainants in relation to the subject to which this discovery relates, as entitles them to call on these defendants for a discovery. (*Mitf. Pl.* 187. 8 *Ves.* 398. 13 *Id.* 240. *Crane v. Deming*, 7 *Day*, 387.)

*M. Hoffman*, for the respondents. A case is *prima facie* made out for a bill of interpleader. Two parties demand the fund in the hands of a stakeholder. One has sued at law, the other persists in a claim. (*Badeau v. Rogers*, 2 *Paige*, 209.) It is sufficient to sustain the bill, that there is a fair doubt as to the rights of the conflicting claimants. The court does not put the uninterested stakeholder in the situation that at his peril he must decide upon intricate matters of fact, or nice points of law. The rule is that it cannot be sustained, "where it appears from the bill itself that the debt or duty unquestionably belongs to one of the parties, and that the complainant is not ignorant of their rights." (4 *Paige*, 392.) It cannot be said that the case of *Abraham v. Plestoro*, (3 *Wend.* 538,) inevitably applies, to and will govern, the present case. As nearly all the judicial talent of the court was against the decision, it may be assumed that distinction will be allowed, and the case allowed to go no further than to rule one of exactly the same cir-

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cumstances. Again, it was held in that case that if the property had been on board a British vessel on the high seas at the time of the commission in bankruptcy, it would have passed by the assignment. Now Bell took the bill with him to England, and proof may be given under the present bill that he went in a British steamer. Again; Senator Oliver's opinion (one of the majority) seems almost of itself to warrant the present suit. The attention of the court is called to the distinction he takes between a perfected commission in bankruptcy not objected to or questioned by the bankrupt, and the case before him of a provisional assignee, the bankrupt contesting its legality and denying knowledge of it. It is said we have shown by our bill that neither party claiming is entitled, but a third party, viz. the Bank of British North America at Montreal. Examining the bill strictly, it will be seen that the averment of fact is, that the representations of the agent sent to New-York were true, viz. that Bell had absconded, and got by criminal acts a considerable amount of money in his possession. But as to the bank notes in question the allegation is only that they, the complainants, received notice of the criminal acts, and that such notes were not the property of Bell, but part of the funds fraudulently procured by him. There is no averment that this is true, that such notes were part of such funds. A point was made below, that the discovery asked for was improper; and the second branch of the demurrer applies to this. The answer is, that some of the discovery prayed is clearly proper; for example, whether the suit is not prosecuted for account of Bell by Hazard, with a view to parties if nothing else. The demurrer is to the whole discovery, and must therefore be overruled, even if a limited demurrer would have been good.

THE CHANCELLOR. This appears to be a proper case for a bill of interpleader. For, upon the case stated in the complainant's bill, it is a matter of doubt to which of the defendants the bill of exchange in question actually belongs. The complainants therefore cannot safely pay it to either.

The case of *Abraham v. Plestoro*, (3 *Wend. Rep.* 538,) in

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deed decided that an assignment under the English bankrupt laws could not have the effect to transfer property which was not within the territorial jurisdiction of the English government at the time of such assignment, even as against the bankrupt himself; where the assignment had not been executed by him. But that was only in accordance with a previous decision of the supreme court of the United States, and of several decisions of different state courts, that foreign bankrupt laws have no extra territorial force to transfer property which was not within the jurisdiction of the government under whose laws such transfer was claimed, at the time of the alleged transfer. And the only difference between this court, and the majority of the members of the court for the correction of errors, in the case of *Abraham v. Plestoro*, was upon the question whether the property in controversy was constructively within the jurisdiction of the English government at the time the proceedings in bankruptcy were instituted and the provisional assignee appointed. For Senators Stebbins and Maynard, who delivered opinions in favor of the reversal of the order of the chancellor in that case, conceded the point that if the property had been within the operation of the English bankrupt laws, even constructively by being on board of a British vessel upon the high seas, the title to it would have passed under the operation of those laws.

Here the assignee in bankruptcy claims the property in this bill of exchange, upon the ground, as he alleges, that at the time of the issuing of the commission of bankruptcy, and at the time of his appointment as assignee, it was in fact within the British dominions, in the hands of the bankrupt himself or of his agent. If this claim is well founded in fact, I cannot say that the assignee in bankruptcy is not entitled, in equity at least, to recover the amount due upon this bill of exchange, in preference to the bankrupt himself, or any other person except a bona fide holder of the same for a valuable consideration and without notice of the rights of the assignee. For the legal presumption is that the bill was drawn upon funds in the hands of the drawees, who were in London; so that the bill itself, as

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well as the fund appropriated for its payment, were both within the operation of the bankrupt law.

On the other hand, if the bill of exchange as well as the bankrupt himself were within the United States at the time of the issuing of the commission of bankruptcy, and at the time of the appointment of the assignee, I do not see any thing that can protect the complainant from a recovery against them in a suit instituted here, either by the bankrupt himself, or by any other person to whom he has transferred it either with or without consideration. So if it actually belonged to the defendant Speer, at that time, in whose name it was drawn, and not to Bell the bankrupt, Speer may recover the amount thereof from the complainants, either by a suit in his own name, or in the name of Hazard as his endorsee, for his use ; if he has thought proper to transfer it to Hazard, for that purpose. And a suit having been brought in the name of the defendant Hazard, he is also a proper party to this bill of interpleader ; whether such suit is brought for his own benefit, or for the benefit of Speer as he alleges, or for the benefit of the bankrupt himself, as is probably the fact.

The counsel for the appellants is in an error in supposing that the complainant's bill shows upon its face that the bill of exchange in question belonged to the Bank of British North America in Montreal, upon the ground that it was purchased with funds fraudulently and criminally obtained from that bank by R. C. Bell. The fact that it was purchased with funds thus obtained is not charged in the complainants' bill of complaint. They merely state that an agent of that bank arrived at New-York and gave them notice to that effect, and that they must not pay the bill of exchange, or the price thereof, to R. C. Bell ; in consequence of which notice they were induced to write to the drawees not to accept or pay such bill.

The order appealed from is not erroneous ; and it must therefore be affirmed with costs. The appellants must pay the costs, and put in their respective answers, within the time allowed for that purpose by the order, or the complainants' bill is to be taken as confessed against them.

ALSTON and wife *vs.* JONES and others.

A bill to set aside a will, which secures to a married woman and her issue, a share of the property of the testator, for her separate use during coverture, is improperly filed by the husband in the names of himself and his wife; the interests of the complainants being in conflict.

In such a case, the wife, instead of being joined with her husband as a complainant, should be made a defendant.

Persons having adverse or conflicting interests in the subject of the litigation should not be joined as complainants in the suit.

Where a particular allegation is inserted in a bill, for the purpose of transferring the jurisdiction from a court of law to a court of equity, the bill, or rather that particular allegation in the bill, must be verified by the oath of the complainant, or by the oath of some other person, on his behalf, who knows the fact.

And where such allegation covers the whole equity of the bill, the defendant need not demur specially to that allegation, on the ground that it is not verified, but may demur generally; stating for cause of demurrer that the bill is not verified by oath.

THIS case came before the chancellor upon a demurrer of G. A. Jones, one of the defendants, to the complainants' bill of complaint.

John Mason, late of the city of New-York, died, seised and possessed of a large real and personal estate. And the bill in this cause was filed by J. Alston, in the names of himself and his wife, who was a daughter of the decedent, to set aside a testamentary paper which had been propounded by the executors and trustees named therein, and admitted to probate by the surrogate, as the last will and testament of the decedent. And the other six children of the decedent, and his grandchildren, the issue of a deceased child, and the executors and trustees named in the alleged will, were made defendants in the suit; together with some of the other grandchildren of the decedent who were interested in sustaining the will as a valid testamentary disposition of his property.

By the terms of the will in controversy, the one-eighth of the real and personal estate of the decedent to which Mrs. Alston would have been entitled in case of an intestacy, or to which she and her husband would have been entitled, in her right, was devised and bequeathed to trustees, in connection with the other

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seven-eighths of his property, in trust, out of the income thereof to pay her an annuity of \$3000 for her separate use and benefit, during the joint lives of herself and her husband, with power to the trustees to increase the annuity during her life, and to accumulate the residue of such income for the benefit of her issue; giving to her the whole capital of that eighth of the estate in case she survived her husband. But if she died in the lifetime of her husband, leaving issue, the capital as well as the surplus income thereof was devised and bequeathed to such issue, subject to an annuity of \$3000 to her surviving husband, during his life. The bill alleged, among other things, that the decedent was of unsound mind, and was in a dying state, and wholly incompetent to make a valid testamentary disposition of his property, at the time of making the alleged will, which had been admitted to probate by the surrogate. The complainants also insisted that the will was invalid, even if the decedent was competent to execute the same, on account of the illegality of its various provisions. And for the purpose of showing that the complainants had not a perfect remedy at law, to recover the possession of Mrs. Alston's one-eighth of the real estate of which her father died seised, the bill alleged that the decedent, in his lifetime, had leased and demised to divers persons, large portions of his real estate for terms of years; which terms of years, at the time of the filing of the bill in this cause, were still unexpired. But the bill was not verified by the oath of the complainants, or of any other person in their behalf.

The defendant George A. Jones, who was one of the grandchildren of the decedent, and a devisee and legatee of a portion of one-eighth of the estate and of other interests therein, demurred to the bill for want of equity. And he stated, as a special ground of demurrer, that the bill was improperly filed by the husband in the joint names of himself and his wife, instead of making her a party defendant, to set aside a will creating a trust in her favor, and for her separate use. This defendant also stated, as a ground of demurrer, that the bill was not verified by oath.



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*C. O'Connor*, for the complainants. The object of the bill of complaint is to set aside the alleged trust, and to establish the title of Mrs. Alston as heiress at law, by descent. This is a higher and better title in her than that offered to her by the alleged will. She has a right to prefer the former, and on electing so to do, is a proper complainant, and as such must join with her husband. The defendants cannot, by their unlawful procurement of this will, absolutely deprive Mrs. Alston of the power to file a bill as complainant to set it aside. She is not bound to appear in support of it. If the circumstance that Mrs. Alston has an interest to support the will, as well as an interest against it, whilst her husband's interest is altogether against it, requires that she should appear separately from him, still it is not necessary that she should be a defendant. She may be a co-complainant, and the court can by order appoint an indifferent person as her next friend, to appear for her and see that her interests suffer no prejudice. A decree in a suit so conducted would bind her. If the course above suggested is proper, the demurrer on the record should be overruled with costs, and this amendment of the proceedings should be allowed without costs. (*Robinson v. Smith*, 3 *Paige*, 233.)

*M. S. Bidwell*, for the defendant. Mrs. Alston should have been made a party defendant. The object of the bill is, to set aside the will of John Mason. This will secures to Mrs. Alston an income to her separate use, and contingently, an estate in which her husband has no interest. Her interest, therefore, is adverse to that of her husband. (*Grant v. Van Schoonhoven*, 9 *Paige*, 255. *Story's Eq. Pl.* § 63, n. 4.) The demurrer is, for this reason, well taken.

The bill shows no equity, and nothing to give this court jurisdiction; unless it be that there are outstanding leases by the testator of some part of his real estate. And, with regard thereto, as the bill seeks to transfer to this court a subject matter properly cognizable at law, there should have been an affidavit; and the want of it is a ground of demurrer. (*Lynch v. Willard*, 6 *John. Ch. Rep.* 346. *Whitchurch v. Golding*, 4

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*P. Wms.* 541. *Hook v. Dorman*, 1 *Sin. & Stu.* 227. *Story's Eq. Pl.* § 477. *Mason v. Mason's Ex'r*, 2 *Sand. Ch. Rep.* 432.) As these causes of demurrer were distinctly pointed out in the demurrer of this defendant, the bill should be dismissed with costs, as to this defendant.

THE CHANCELLOR. The objection is well taken, that the bill is improperly filed by the husband in the names of himself and his wife, to set aside a will which secures to her and her issue, her one-eighth of the property of her deceased father, for her separate use, during the coverture. It is very evident from this bill, that the interests of the husband and wife are in conflict in this case. For if the will is sustained, she not only gets a clear annuity of \$3000 for her separate use, during coverture, with the chance of an increase thereof to the whole amount of the income, but also the entire eighth of the personal as well as the real estate of her father, absolutely, in case she should survive her husband. And if he survives her, the will secures it to her issue, subject to an annuity to her surviving husband, payable out of the income, for his life. The will also gives to her certain contingent interests in other portions of the estate. On the other hand, if the husband succeeds in setting aside the will, for any cause, he becomes entitled to the whole of her eighth of her father's personal estate; and to the income of the real estate during his life. And she also loses her contingent interest in the other three-eighths of her father's estate; to which she may be entitled under the will. The wife therefore, instead of being joined with her husband as a complainant, should have been made a defendant. For persons having adverse or conflicting interests in the subject of the litigation should not be joined as complainants in the suit.

This case, to be sure, is not like that of *Cholmondeley v. Clinton*, (4 *Bligh's Rep. O. S.* 1,) where the bill itself showed that both complainants could not be entitled to the relief sought, without showing to which the right to relief belonged. For upon this bill, the complainants show that there was no valid will which could give a separate estate to the wife. But the

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true ground of objection is that this bill is the bill of the husband alone, and the wife will not be bound by any of the allegations therein, in a future litigation between her and the defendants, or with other persons. (*Grant v. Van Schoonhoven*, 9 *Paige's Rep.* 257.) It being the husband's suit, and the wife's interest being in conflict with his, she was as necessary a party, as a defendant in the suit to set aside the will, as the other devisees, who also had an interest in supporting the will.

I am not prepared to say Mrs. Alston had not the right, if she thought proper to do so, to file a bill herself, to set aside the will, so far as the real estate was concerned, if the decedent was incompetent; to enable her to give the property to her husband for life instead of her issue, or to enable her husband and herself to dispose of it in fee, for their own purposes. But to enable her to do so, she must either file her bill against her husband and the other parties, by her next friend; or she must make it her own suit as well as the suit of her husband, by suing by her next friend and joining with her husband, as a separate or distinct complainant in the suit.

Unless the trusts in the will are invalid, so as to entitle the complainants to relief as to the personal estate on that ground, the objection is also well taken, as to the whole discovery and relief sought, that the bill is not verified by oath. For so far as the bill seeks to set aside the will upon the ground of the incapacity of the testator, the probate before the surrogate is conclusive, except upon appeal, so far as the personal estate is concerned; and it cannot be questioned in this collateral way. And as to the real estate the remedy at law is perfect; unless there are outstanding terms, which prevent the recovery of the possession of the undivided one-eighth of the real estate which has descended to Mrs. Alston, as one of the heirs, if the allegations in the bill are true. The law is well settled that where a particular allegation is inserted in a bill for the purpose of transferring the jurisdiction from a court of law to a court of equity, the bill, or rather that particular allegation in the bill, must be verified by the oath of the complainant; or by the oath of some other person, on his behalf, who knows the fact.

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(*Lynch v. Willard*, 6 *John. Ch. Rep.* 346. *Hook v. Dorman*, 1 *Sim. & Stu. Rep.* 230.) And as the allegation as to the existence of outstanding terms, covered the whole equity, unless the complainants are right in supposing that the trusts of the will are illegal, it was not necessary to demur specially to the charge that there were outstanding terms; upon the ground that such charge was not verified. But he might demur generally, stating for cause of demurrer that the bill was not verified by oath. For in the absence of a verification of the truth of that charge, according to the course and practice of the court, the demurrer was not too broad in covering the whole equity and relief sought by the bill.

The first objection, that the suit is improperly brought by the husband in the name of himself and his wife, instead of making her a party defendant, goes to the whole bill, even if some of the trusts in the will in relation to her share of her father's estate are invalid. It is not necessary, therefore, to consider that question, in the present situation of the suit, even in reference to the personal estate of the decedent. The demurrer must be allowed, and the bill must be dismissed as to the defendant G. A. Jones, with costs, but without prejudice to the rights of the complainants, or either of them, in any future litigation; unless the complainant J. Alston, within thirty days after service of a copy of the decree, elects to amend, by striking out the name of his wife as a complainant and making her a party defendant, and also by verifying by his oath, the charge in the bill relative to the existence of the outstanding terms in the real estate of the decedent, or in some part of it. In case he elects to amend, he must pay the costs of this defendant upon the demurrer, and serve a copy of the bill as amended, within sixty days after the receipt of the taxed bill of costs.

It does not appear by the papers before me whether the suit is in a situation to allow of an amendment as to the other defendants, with or without payment of costs as to them. But as the cause could not be in a situation to take testimony therein before this demurrer was disposed of, there will probably be no difficulty in obtaining leave to withdraw the replication to

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the answers of the other defendants, if one has been filed, upon such terms as may be proper. But if the bill cannot be amended as to the other defendants, the only remedy is to discontinue the suit, and file a new bill as to all the defendants.

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DE MOTT vs. STARKEY and others.

[Distinguished, 84 N. Y. 135.]

The purchaser of a negotiable note, or bill of exchange, not payable on demand but at a specified time, is not a bona fide holder thereof without notice, if he became such purchaser after the bill or note had become due and was dishonored. In other words, the purchaser of a bill or note which has become due and payable, according to the terms thereof, takes it subject to all equities, or legal or equitable defences which existed against it in the hands of the person from whom he received it.

To entitle a party to the character of a bona fide purchaser without notice of a prior right or equity, he must not only have obtained the legal title to the property, or the negotiable security, but he must have paid the purchase money, or some part thereof at least, or have parted with something of value upon the faith of such purchase, before he had notice of such prior right or equity.

THIS was an appeal from a decree of the assistant vice chancellor of the first circuit. The facts as established by the pleadings and proofs, and the proceedings in the cause, were substantially as follows :

The complainant being the owner of a farm in the county of Seneca, sold it to H. Montgomery, and took from him a bond and mortgage to secure the payment of the purchase money. Montgomery afterwards sold and conveyed the farm to W. W. Starkey, one of the defendants in this suit, and took from him a bond and mortgage to secure the purchase money on that sale; amounting to \$5290, payable in several instalments. At the time of the execution of the last bond and mortgage, Montgomery wished the complainant to take the same and cancel his bond and mortgage, so as to relieve the farm in the hands of Starkey from that incumbrance. But the complainant was unwilling to do so, as Montgomery was embarrassed in his cir-

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*De Mott v. Starkey.*

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cumstances, and had been sued, and the complainant was apprehensive there might be intermediate incumbrances upon the property which would affect the validity of the security of the Starkey mortgage. It was therefore agreed between Starkey and Montgomery and the complainant, that Starkey should make the payments upon his mortgage to Montgomery, as they became due, to the complainant, to be applied on the mortgage of Montgomery to the latter; and that whenever it could be safely done the first bond and mortgage should be cancelled, and Starkey's bond and mortgage should be assigned, by Montgomery, to the complainant in lieu thereof. When the first payment upon Starkey's bond and mortgage became due, the complainant not deeming it then safe to cancel the first mortgage, and Starkey not being willing to make an absolute payment on his own bond and mortgage, while the complainant's bond and mortgage was still outstanding, it was agreed between them that Starkey should advance to the complainant \$700 to be applied towards the first payment upon the bond and mortgage to Montgomery when the same should be assigned to the complainant, and when the mortgage of Montgomery to the latter should have been cancelled; and that in the meantime the complainant should give his note to Starkey for the amount, to be collectable in case the arrangement for the cancelling of the first mortgage and the assignment of the second should not be perfected. The money was advanced and a note given therefor, accordingly, on the 18th of June, 1839, payable one day after date. In December, 1840, the complainant having become satisfied that it would be safe for him to do so, cancelled his bond and mortgage and took the assignment of Starkey's bond and mortgage, which had been left in the hands of a third person to be delivered to the complainant in that event; and Starkey was duly notified of the assignment, and that the first mortgage had been cancelled.

In July, 1840, Starkey transferred the \$700 note to his uncle, Clayton Semans, and took his note for the same amount. But nothing was paid by the latter on account thereof until the fall of 1841, many months after he had been made acquainted with

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the complainant's rights; and after the note of the latter had been formally demanded of himself as well as of Starkey, accompanied by an offer to endorse or receipt the amount thereof upon the bond and mortgage which had been assigned to the complainant.

The bill was filed in April, 1842, to foreclose Starkey's bond and mortgage; he never having paid any thing thereon except the \$700 for which his note was given. Semans was made a party; and the bill, after stating these facts, prayed that Semans might deliver up the \$700 note of the complainant, to be cancelled, and that the amount thereof might be allowed upon the bond and mortgage, and for a foreclosure and sale for the payment of the residue of the debt. The assistant vice chancellor made a decree accordingly. And the defendant Semans appealed from that part of the decree which directed the surrender of the note and the allowance of the amount thereof upon Starkey's bond and mortgage; and from so much of the decree as directed Starkey and Semans to pay the extra costs occasioned by the litigation in this matter, beyond the ordinary expense of a foreclosure suit where there is no defence.

*A. Thompson*, for the appellant.

*E. Sandford*, for the respondent.

THE CHANCELLOR. The assistant vice chancellor arrived at a correct conclusion in this case, not only as to the matters of fact, but also as to the legal and equitable rights of the parties. The evidence fully establishes the fact that the \$700 note in controversy was not given upon a loan made to De Mott; but was merely a security for the return of the amount, with interest, in case the arrangement should not be consummated so as to have the \$700 applied as a payment on Starkey's bond and mortgage, upon its being assigned to the complainant in payment of Montgomery's prior mortgage. Starkey having gone into the actual possession of the farm, and occupied it for two seasons without paying any part of his purchase money, and

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the farm being then of less value than the principal and interest due upon his bond and mortgage, the selling of the \$700 note to a third person, so as to secure the repayment of that amount to himself, instead of having it applied upon the bond and mortgage according to his agreement, was an attempt to defraud De Mott out of that amount. And Semans, the appellant, was not authorized to hold and collect the note, as against the right of the maker thereof to have it applied upon the bond and mortgage, according to the agreement of Starkey, unless he could establish a state of facts entitling him to the character of a bona fide purchaser and holder of the note for a valuable consideration, and without notice of the complainant's rights. And the appellant wholly failed to establish such a defence in this case.

It is now the settled law, both here and in England, that the purchaser of a negotiable note or bill of exchange, not payable upon demand but at a specified time, is not in a situation to sustain the character of a bona fide holder thereof without notice, if he became such purchaser after the bill or note had become due and was dishonored. In other words, the purchaser of a bill or note which has become due and payable, according to the terms thereof, takes it subject to all equities, or legal or equitable defences, which existed against it in the hands of the person from whom he received it. (*Bayly on Bills*, 2d Am. ed. 134, 544. *Chitty on Bills*, Barb. ed. 244. 5 *John. Rep.* 118. 8 *Idem*, 454.) Here, by the terms of the note, it had been due and payable more than twelve months before Semans became the purchaser thereof. He should therefore have inquired and ascertained from De Mott whether it was actually due, and was to be paid by him; before he purchased it of Starkey. And having neglected to do so, he took it subject to the right of De Mott to have the amount applied in part payment of the bond and mortgage of Starkey in case he should cancel his own bond and mortgage and take an assignment of Starkey's bond and mortgage to Montgomery, in lieu thereof.

Again; to entitle a party to the character of a bona fide purchaser without notice of a prior right or equity, such party must



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not only have obtained the legal title to the property, or the negotiable security, but he must have paid the purchase money, or some part thereof at least, or have parted with something of value upon the faith of such purchase, before he had notice of such prior right or equity. And Semans, long before he made any payment to Starkey on account of the purchase of this \$700 note, not only had notice of De Mott's rights under the agreement with Starkey, but had been formally called on to surrender up the note to De Mott's agent, and to have the amount thereof endorsed upon the bond and mortgage. The payment of any part of the purchase money of the note, after what had then taken place, was a payment in his own wrong; and was an attempt to assist Starkey in defrauding the complainant. The assistant vice chancellor, therefore, properly charged the appellant, as well as Starkey, with the extra costs occasioned by their unconscientious defence in this case.

No part of the decree appealed from was erroneous, and it must be affirmed with costs.

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 LOWRY vs. TEW.

The principle upon which courts of equity hold that a part performance of a parol agreement respecting land is sufficient to take a case out of the statute of frauds, is that a party who has permitted another to perform acts on the faith of such an agreement, shall not be allowed to insist that the agreement was invalid because it was not in writing, and that he is entitled to treat those acts as if the agreement in compliance with which they were performed had not been made.

Taking possession of land under a parol agreement, and in compliance with the provisions of such agreement, accompanied by other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute of frauds.

Although a party who has gone into possession of premises under an agreement to purchase the same is, at law, a tenant at will to the holder of the legal title, yet if he is in under a written agreement, made by the owner, to sell and convey the prem-

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ises to him, or under a parol agreement which has been so far consummated as to entitle him to a specific performance, he is in equity considered the owner of that title for which he contracted, and which the vendor is able to give him. And if that title is an equity of redemption, he has the same claim to redeem, except as against bona fide purchasers without notice of his equitable rights, as if the equity of redemption had been conveyed to him at the time when his equitable rights accrued under the contract.

1. is a general rule of equity pleading that a defendant who claims protection as a bona fide purchaser without notice, must deny such notice although it is not distinctly charged in the bill.

THIS was an appeal from a decretal order of the vice chancellor of the eighth circuit, overruling a demurrer to the complainant's bill. The object of the bill was to redeem a farm, of about 203 acres of land in the county of Chautauque, from a mortgage, and from a foreclosure and sale under the same.

The bill stated, in substance, that in June, 1833, J. Sherman, being the owner of the farm in question, mortgaged it to The New-York Life Insurance and Trust Company, to secure the payment of \$1000 and interest. Three judgments were afterwards recovered against Sherman, which became liens upon his equity of redemption in the farm; one in favor of A. Varney of about \$250, which was the oldest lien upon the farm, and two others, amounting together to about \$1000, both of which belonged to the complainant N. A. Lowry, on and previous to the first of March, 1843. In January, 1843, the farm was sold upon an execution issued on the oldest judgment, and was purchased by Varney, the plaintiff in that judgment. And in March, 1843, Sherman, for a valuable consideration, bargained and sold to the complainant all his right, title and interest in the farm subject to the mortgage and judgments, &c. and his equity and right of redemption, and surrendered the possession thereof to him, with the exception of a portion of the farm house. There was no written agreement, but Sherman agreed to give the complainant a deed of the premises, to carry into effect the verbal agreement. And on the 14th of the same month the complainant rented the premises to a tenant, upon shares; who moved into the farm house on that day, and continued in possession until after the sale upon the decree of foreclosure as

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hereafter mentioned. But the deed from Sherman for the farm, in pursuance of such agreement, was not made out and executed until about the last of May, 1843, when it was duly acknowledged and recorded.

In April, 1843, The New-York Life Insurance and Trust Company filed a bill in chancery to foreclose the mortgage to the company; making the mortgagor and his wife, and Varney who had bid off the equity of redemption at the sheriff's sale under his judgment, the only defendants in the suit; and a notice of the *lis pendens* was duly filed on the 25th of the same month. A final decree of foreclosure and sale was entered in that suit, and the premises were sold by the master, under such decree, in September, 1843, and were purchased by W. H. Tew, the defendant in this suit, for the price or sum of \$2034.50. The master conveyed the premises to the purchaser, and brought the surplus moneys, amounting to \$842, into court. Out of such surplus moneys Varney was paid the amount due to him upon his purchase at the sheriff's sale; and the complainant applied for and received the balance, as a judgment creditor having liens upon the equity of redemption.

The bill also charged, that at the time of the master's sale, Tew, the defendant in this suit, knew that Lowry, the complainant, was in possession of the mortgaged premises, by his tenant. And the complainant had offered to redeem the premises, by paying the defendant the amount of his bid at the master's sale, and interest thereon, and his expenses, upon being indemnified against a mortgage given to The New-York Life Insurance and Trust Company upon the premises for a part of the purchase money on the master's sale; or to take the premises, subject to the payment of that mortgage, and to pay the defendant the balance of his purchase money and interest. But the defendant refused to permit him to redeem the premises.

*S. Matthews*, for the appellant. The parol contract which the complainant sets up created no interest in the land. (2 R. S. 69, § 6.) This section declares in express terms that "no estate or interest in land shall be created," &c. except in the

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manner specified in that section. Section 8 declares the parol contract to be void. In the revisers' notes to the 6th section the person making a parol contract, and taking possession under it, is called a tenant at will. This was the necessary consequence. Lowry then had no interest in the land, but was a mere tenant at will. It will not be pretended that a tenant at will has a right to redeem. The tenancy at will terminated when Lowry took a deed, 29th May, 1843, more than 30 days after filing notice of *lis pendens*. There was no such change of possession as would be notice to the complainants in the foreclosure suit. The mortgagor still remained in the house on the premises. Lowry's cattle and sheep were on the premises before the parol agreement. The only pretence of a change of possession was, that the son of the mortgagor went into the house on the farm, with his father, and worked the farm or shares. The mortgagor still living on the place, the presumption arising from the appearances would be, that the son was occupying under his father. Lowry's cattle and sheep being on the premises was no change, for they were there before the parol contract. The defendant was an innocent purchaser at the sale, and Lowry was present at the sale and did not give any notice of his intention to redeem, or that he had any rights that were not foreclosed. All the notice that the defendant had is set forth between folio 23 and 24 of the bill. The fact that Lowry was in possession, by his tenant and cattle and sheep, on the day of sale, and that the defendant knew it, amounts to nothing. Suppose he did know that Lowry was in possession by virtue of his purchase, that could only relate to the legal purchase when he took his deed. He was informed by the record of the deed. Lowry does not say that he told him or notified him, but that "*he was informed.*" No particular kind or mode of information being expressed, the presumption is that it was the legal information obtained from the record, and this information notified the defendant that Lowry had *no right to redeem*; his deed being subsequent to the filing of the notice of *lis pendens*. Lowry stood by and saw the defendant purchase the land, and did not set up any right or claim different

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from what the record showed. This state of facts, as detailed in the bill, makes out against Lowry an *estoppel in pais*, and forever precludes him from redeeming, if he before had the right. (*Cowen & Hill's Notes to Phil. Ev.* vol. 1, p. 207 to 209. *Dezell v. Odell*, 3 Hill, 215.) It was no part of the parol agreement that Lowry was to have possession. After making the parol contract he says the mortgagor surrendered up to him the possession. The power reserved to the court of chancery by the 10th section of the statute of frauds, does not affect the operation of the 6th section, so as to make a parol agreement create a present interest in the land. The statute is positive and unequivocal in its terms, and prevents the creation of any interest whatever, either legal or equitable. There is no more foundation for saying that it created an *equitable* interest, than a *legal* interest. It excludes *any interest*. The vice chancellor bases his decision upon a remark of Chancellor Kent. (4 *Kent's Com.* 162.) The words there used are, "Every person who has an interest in, or a legal or equitable lien upon, the lands," has the right to redeem. This is not disputed, and it seems a little strange that he should cite an authority so exactly against his position, as the only foundation to rest it upon. Chancellor Kent does not say a legal or equitable *interest*. It is not pretended that Lowry's claim was a legal or equitable *lien*. I know of no authority allowing the owner of a mere equitable interest in land to redeem. It is not, however, conceded that Lowry had even an equitable interest in the land. An executory contract in writing, does not create any interest in lands. The 6th section of the statute declares that nothing short of a conveyance creates an interest in land. In this view of the case, if Lowry's parol contract had been reduced to writing, it would not have authorized him to redeem, for the reason that such a contract does not convey an interest *in presenti*. (*Jackson v. Moncrief*, 5 Wend. 26.) The object of the 10th section of the statute of frauds was to permit the court of chancery to compel a specific performance of agreements where there had been part performance; but no power is there given to the court to say that a parol or written contract creates an interest

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in land, when the statute has expressly declared that it shall not create any interest in land. The complainant's bill does not show such a contract as the court of chancery would enforce specifically. The giving possession formed no part of the contract. The complainant's bill does not show that any part of the contract was performed prior to the giving of the deed. When the deed was given, it put an end to all power of the court of chancery to enforce performance, if it had before existed, so that the 10th section of the statute becomes entirely nugatory, so far as this case is concerned. The complainant acquired no right to the crops on the ground at the time of the master's sale, nor to the use of the premises after the sale. Suppose he had a right to redeem, that gave him no right to the use of the land until he perfected his redemption. He made no attempt to redeem until a year after the sale.

*A. Taber*, for the respondent. The complainant has a right to redeem as a purchaser of the equity of redemption previous to the filing of the bill to foreclose; and he is not barred by the decree foreclosing the equity of the mortgagor, as he was not a party to that suit. The complainant purchased the premises of the mortgagor, by parol, previous to the commencement of the foreclosure suit, and this purchase was subsequently consummated by a deed of conveyance from the mortgagor to the complainant. This purchase by parol, or contract of purchase, would be decreed to be specifically performed by the mortgagor, (the vendor,) as it was made upon "a good and valuable consideration," and was immediately followed by part performance, which takes the case out of the statute of frauds. The complainant entered into possession of the premises immediately after his parol purchase, and was in possession by his tenant when the foreclosure suit was commenced. The complainant's cattle, sheep, and stock were on the premises when he purchased, and his tenant went to work, &c. Possession has always been held a part performance which will take a case out of the statute. The complainant was in possession at the time the foreclosure suit was commenced, and this was notice to the

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mortgagees, the complainants in that suit, and they should have made the complainant in this suit a party, in order to bar his equity. The complainant has a right to redeem simply to protect his interest in the crops raised by him and his tenant, and to protect himself from the claim made for the value of the crops.

THE CHANCELLOR. Upon the facts stated in this bill it must be presumed that Lowry, the complainant, was in the open and notorious possession of the mortgaged premises, by his tenant, at the time the proceedings to foreclose the mortgage were instituted. I think also, upon the face of this bill, it appears that the verbal agreement for the sale of the premises had been so far consummated, by a part performance, at the time of the institution of the foreclosure suit, as to give to Lowry an equitable right to redeem the premises from the mortgage as well as from the sheriff's sale. For he had not only taken possession of the premises, in conformity to the terms of the agreement, but had actually rented them for a year upon the faith of that verbal contract of purchase. So that if the vendor had resiled from his contract, instead of giving the deed in conformity with the terms of that contract, it was not in his power to place the purchaser in the same situation in which he was previous to the taking possession under the agreement.

The principle upon which courts of equity hold that a part performance of a parol agreement is sufficient to take a case out of the statute of frauds, is that a party who has permitted another to perform acts on the faith of an agreement, shall not be allowed to insist that the agreement is invalid, because it was not in writing, and that he is entitled to treat those acts as if the agreement, in compliance with which they were performed, had not been made. In other words, upon the ground of fraud in refusing to execute the parol agreement after a part performance thereof by the other party, and where he cannot be placed in the same situation that he was in before such part performance by him. Taking possession under a parol agreement.

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and in compliance with the provisions of such agreement, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute of frauds. (*See 2 Story's Eq. § 761, and the cases there referred to; Keats v. Rector, 1 Pike's Ark. Rep. 419.*)

It is true a party who has gone into possession of premises under an agreement to purchase the same, is at law a tenant at will to the holder of the legal title. But if he is in under a written agreement, made by the owner, to sell and convey the premises to him, or under a parol agreement which has been so far consummated as to entitle him to a specific performance, he is in equity considered as the owner of that title for which he contracted, and which the vendor is able to give him. And if that is an equity of redemption, he has the same claim to redeem, except as against bona fide purchasers without notice of his equitable rights, as if the equity of redemption had been conveyed to him at the time his equitable rights accrued under the contract. This complainant, therefore, should have been made a party to the foreclosure suit, in order to cut off his equity of redemption in the mortgaged premises. And if the complainants in the foreclosure suit, at the time of the commencement of such suit, had either actual or constructive notice of his rights, and if the defendant Tew, at the time of his purchase of the premises under the decree, had such notice of those rights, the equity of redemption was not foreclosed as against Lowry.

The deed from Sherman to Lowry, and which was long subsequent to the commencement of the foreclosure suit, was sufficient to account for the possession of the latter at the time of the master's sale. Such possession at that time, therefore, was not constructive notice to the purchaser of the complainant's equity. But it is a general rule of equity pleading that a defendant who claims protection as a bona fide purchaser without notice, must deny such notice, although it is not distinctly charged in the bill. A plea or answer, therefore, denying such



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notice, appears to be necessary in order to protect the defendant as a bona fide purchaser at the master's sale.

It is alleged by the defendant's counsel that the complainant was present at the master's sale, and concealed from the bidders at such sale the fact that he claimed that the foreclosure was invalid, as against him, because he had an equitable right to the premises, subject to the incumbrances thereon, and was in possession, by his tenant, at the time the foreclosure suit was commenced. That fact, however, if it is a fact, does not appear in the bill. But if set up and insisted on in the defendant's answer, and established by the proofs, in connection with the fact that Lowry subsequently claimed and received the surplus moneys as a judgment creditor of the owner of the equity of redemption, I should not hesitate to declare such silence a fraud upon the bidders at the master's sale, and intended to increase such surplus for his own benefit; and that he had no equitable claim to relief as against the purchaser at such sale.

This is a question, however, which does not properly arise upon the demurrer, but must be brought before the court by answer to the bill. The order of the vice chancellor overruling the demurrer was therefore right, and must be affirmed with costs.

It appears by the bill that the defendant had given a mortgage to The North American Trust and Banking Company for a part of the amount due them out of the proceeds of the sale. And I am inclined to think they should have been made parties to this bill, to redeem the premises on the ground that the foreclosure and sale were invalid as against him. But as that objection was neither specified in the demurrer, nor urged *ore tenus* upon the argument before the vice chancellor it cannot benefit the defendant on this appeal.

OSTRANDER *vs.* LIVINGSTON and wife.

IN May, 1825, L. and wife leased to H. a piece of land, in the city of New-York, for the term of 21 years. The lease contained a covenant that at the end of the term the premises, and the improvements thereon, should be separately valued and appraised, by sworn appraisers; and that in case the lessors should not, within ten days after the appraisement, elect to take the improvements at their appraised value, then the lessors would sell and convey the premises to the lessee, or his assigns, at the price the same should be appraised or valued at. H. assigned this lease to H. and M.; who afterwards assigned the same to The Sterling Co. In January, 1827, an agreement was made between the lessors and The Sterling Co. by which the former covenanted with the latter that in case The Sterling Co. should underlet or assign any lot or lots upon which no building had already been erected, such lots respectively to be 25 feet in front and 100 feet in depth, and if the under lessee or assignee of such lots respectively should actually build, or cause to be built, on each of the lots so assigned, a two story dwelling house or tenement, with a brick front, then and in such case each and every lot so underlet or assigned, and which should have such dwelling house or tenement erected thereon, should be chargeable with the annual rent of \$60 only, as its proportion of the rent reserved in the original lease; and that such under lessee or assignee, at the termination of the original lease, should, in respect to the improvements on such lot, be entitled to the like appraisement and provisions as were in that behalf specified in the original lease. The Sterling Co. subsequently divided the land into lots of 25 feet in front and rear, and 100 feet in depth, and leased two of those lots to B. for the residue of the term, by separate leases; B. covenanting with The Sterling Co. to pay the rent, and the taxes and assessments, and to build upon each of the lots a house of at least two stories in height, with a brick front. And The Sterling Co. covenanted with B. that, at the end of the term, he should, in respect to the improvements on those lots, be entitled to the like privileges, &c. as were specified in the original lease. The Sterling Co. subsequently re-assigned the original lease to H. & M.; and by divers mesne assignments the same came to, and was vested in, V. at the expiration of the term. B., the lessee of the two lots, instead of building a two story house with a brick front on each lot, divided the two lots into five; each lot or subdivision being 20 feet in front by 50 feet deep, and fronting on another street. Upon the corner lot there was erected by B. or his assigns, a two story house with a brick front. Frame buildings were erected upon three of the other lots, and a feed-store of brick upon the fourth lot. These leases to B. afterwards came by assignment to O the complainant. Shortly before the termination of the original lease, L. and wife agreed with V., the then owner thereof, to pay him for the buildings upon the demised premises, and procured from him an assignment of all his interest in the lease and leasehold premises to their son M. L. Upon the expiration of the lease L. and wife claimed that the complainant was not entitled to pay for the buildings so erected on the five subdivisions of the two lots leased by The Sterling Co. to B., because they were not

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made in pursuance of the agreement with the Sterling Co.; and refused to join in the appointment of appraisers of those two lots and the buildings thereon. On a bill filed by the assignee of B. against L. and wife, to restrain the prosecution of suits at law brought against him and his tenants, to recover the possession of the two lots leased to B., and for a specific performance;

*Held* that the buildings erected upon the lots leased to B. were not such as were contemplated in the agreement between L. and wife and The Sterling Co., or as B. covenanted to build. That although it was not required that the building should cover the whole front of the lot, 25 feet in width, yet that the erection of such a house as was described in the agreement, if built partly on one lot and partly on another, was not a compliance with the terms of that agreement, or with the covenant in the leases to B., as to either lot. And that the complainant, as the assignee of B., was not entitled to any benefit under the agreement of January, 1827; the covenant in that agreement, giving to the sub-lessees, or assignees of particular lots the right to an independent appraisal of their improvements, being limited to such lots as should have been improved in the manner therein contemplated.

*Held also*, that the rights of the complainant, in reference to improvements, were no greater than they would have been had the agreement of Jan. 1827, not been made. And that under the covenant in the original lease, the value of the whole leasehold premises, and the value of the whole improvements, were to be separately estimated; that the covenant giving the lessors the privilege of taking all the buildings or improvements at such valuation, or of conveying the whole of the premises demised, upon being paid the price at which the whole premises, exclusive of the improvements, were valued, at their election, was in its nature indivisible. And that if the entire interest of the lessee in distinct parcels of the demised premises had been assigned to different individuals, all who were interested in the performance of the covenants, or in the different parcels of the demised premises, must unite in the appraisal; and in the purchase of the whole premises, if the lessors elected to convey the same at the appraisal.

*Held further*, that the effect of the agreement of January, 1827, was the same as if the particular lots which were leased or assigned, and built upon in conformity to the terms of that agreement, had formed no part of the premises originally demised to H.

And the bill showing that several other lots of 25 feet by 100 feet, into which the demised premises were subdivided, were sublet to different persons, but not stating who such persons were, or whether any buildings were erected on their respective lots, and if so, whether they were erected in conformity to the provisions of the agreement of 1827, also

*Held* that no relief could be granted upon the bill of the complainant, as framed, even if he had made out a case entitling him to equitable relief in other respects. And that M. L., the assignee of the lease and of a part of the premises originally demised, so far as related to that covenant, was a necessary party to any bill for a specific performance thereof by the lessors; even though the consideration of the assignment of the lease to him was in fact paid by L. and wife, the original lessors.

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Where the consideration of an assignment is paid by one person and the assignment is made to another, the whole legal and equitable title to the assigned premises is vested in the latter, except as to creditors of the former.

THIS was an appeal from a decree of the vice chancellor of the first circuit, allowing a demurrer and dismissing the complainant's bill, with costs.

In May, 1825, the defendants, Maturin Livingston and wife, leased to William C. Holley a piece of land on the south side of Stanton-street, between Suffolk and Clinton streets, in the city of New-York, two hundred feet in width and three hundred feet in depth; also three lots upon Rivington-street, each twenty-one feet by one hundred, and seven lots between Stanton and Rivington streets extending from Clinton to Attorney-street, each being twenty-five feet by one hundred feet, for the term of twenty-one years from the first of May in the year 1825, at a yearly rent of \$2040, payable quarter-yearly. The lease, among other things, contained the following covenant: "It is mutually agreed by and between the parties to these presents, for themselves and their representatives, that at the end of the term hereby demised, the said premises and lots of ground before mentioned and described, and the improvements thereon, shall be separately valued and appraised, under the oath of two reputable disinterested freeholders of the city of New-York, to be appointed by the parties aforesaid, each party choosing one of the said appraisers, and in case they cannot agree, the said appraisers to choose a third, who shall also be a freeholder of the said city and under oath in making the appraisal aforesaid. And in case the said parties of the first part, their heirs, executors, administrators or assigns, shall not within ten days after the said appraisal, elect to take the said improvements at the sum which the same shall be appraised at, and pay the same to the said party of the second part, his heirs, executors, administrators or assigns, then and in such case the parties of the first part covenant and agree for themselves, their heirs, executors, administrators and assigns, to sell to the said party of the second part, his heirs, executors, administrators or assigns, the said premises and lots hereby de

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mised, at the price the same shall as aforesaid be appraised or valued at, and on the consideration money being paid, forthwith execute and deliver a good and sufficient deed of conveyance therefor, in fee simple."

Holley assigned this lease to Hinton and Moore, who afterwards assigned the same to The Sterling Company. In January, 1827, while that company were the owners of the lease, an agreement was made between them and Livingston and wife, the lessors, under their respective seals, and duly acknowledged and recorded. That agreement recited the making of the lease, and the substance of its provisions, and the assignments thereof, and that The Sterling Company, the assignees, were desirous of having the privilege of underletting or assigning parts of the premises so that the same should remain charged only with a just proportion of the rent reserved in the original lease, and that the lessors had assented to the same in the manner therein mentioned. Livingston and wife thereupon covenanted with The Sterling Company, and their successors and assigns, that in case that company, or their successors or assigns, should underlet or assign for a term or time not beyond the duration of the original lease, any lot or lots upon which no building had already been erected, such lots respectively to be twenty-five feet in front and one hundred in depth, and the under lessee or assignee of such lots respectively should actually build, or cause to be built, on each of the lots so assigned, a two story dwelling house or tenement, with a brick front, then and in such case each and every lot so underlet or assigned, and which should have such dwelling house or tenement erected thereon, should, while the same remained thereon, be chargeable with the annual rent of \$60 only, payable in quarter-yearly payments, as its proportion of the rent reserved in the original lease, and with the taxes and assessments upon such lot; and that upon the punctual payment to the original lessees, or their heirs or assigns, of such proportion of the rent, and keeping down the taxes and assessments, such lot should not be liable to forfeiture by re-entry or distress by reason of the non-payment of the residue of the rent reserved in the original lease, or the

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non-payment of taxes or assessments upon the residue of the premises; and that such under lessee or assignee of such lot, or his assigns, at the termination of the original lease, should, in respect to the improvements on such lot, be entitled to the like appraisement and provisions as were in that behalf specified in the original lease. The agreement then contained a provision that nothing therein contained should impair the right of the original lessors, or their heirs or assigns, to recover the whole rent from The Sterling Company, or their successors or assigns, and in case of non-payment thereof, or the breach of any other covenant in the release, to re-enter or to distrain upon all the residue of the demised premises in the same manner as if that agreement had not been made. And The Sterling Company covenanted and agreed for themselves, their successors and assigns, to pay the yearly rent reserved in the original lease and perform all the covenants therein contained on the part of the lessee.

The Sterling Company thereupon divided the parcel of land first described in the lease into twenty-four lots, 25 feet in front and rear, and 100 feet in depth; eight of which lots fronted on Stanton-street, eight on Suffolk-street, and eight on Clinton-street. In April, 1827, The Sterling Company leased two of those lots, fronting on Stanton-street, being the corner lot bounded upon Suffolk-street and the adjoining lot, on the east, by separate leases, to J. N. Brower, for nineteen years from the first of May then next, the whole residue of the term remaining of the original lease, at the yearly rent of \$60 for each lot, payable quarterly to The Sterling Company or their assigns, but with liberty to the lessee to pay the rent to Livingston and wife, the original lessors, or their assigns; reserving the right to re-enter for the non-payment of rent, or for a breach of any of the covenants on the part of the lessee. And the lessee covenanted with The Sterling Company, and their successors and assigns, to pay the rent and the taxes and assessments, and to build upon the demised premises a house of at least two stories in height, with a brick front, and to surrender up the premises so underlet, to the lessors or their assigns, at the end of the

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term. The Sterling Company covenanted with the lessee for the quiet enjoyment of the premises; and to indemnify and save him harmless against any forfeiture, re-entry, or distress on account of any of the covenants, conditions, or agreements in the original lease from Livingston and wife, and that the lessee or his assigns at the end of the term should, in respect to the improvements on the lot so demised to him, be entitled to the like privileges, and upon the like appraisement and provisions, as were in that behalf specified in the original lease. These leases to Brower also recited the giving of the original lease, and its provisions, and the subsequent agreement between the original lessors and The Sterling Company, as the assignees of that lease, the division of the first mentioned parcel of the premises into twenty-four lots, and that The Sterling Company had agreed to underlet the one of those lots described in the new leases respectively to Brower.

The Sterling Company also under-let divers other of the lots to different persons; but before the lots had all been under-let they reassigned the original lease and all their estate and interest in the demised premises, to Hinton and Moore; and by divers mesne assignments the same came to and was vested in W. Vernon. Brower, the lessee of the two lots at the corner of Stanton and Suffolk streets, and fronting on the former, instead of building a two story house with a brick front on each lot, as he covenanted to do in his leases, divided the two lots into five, each being twenty feet wide on Suffolk street and extending east parallel to Stanton-street fifty feet. Upon the corner lot of these subdivisions there was erected by Brower, or his assigns, a two story house with a brick front upon Suffolk-street, and extending back on Stanton-street 34 feet. Frame buildings were erected upon three of the other lots of such subdivision, and a feed store of brick upon the fourth. Brower died in 1828, and his executors assigned his leases for the two lots to Susan Brower, who in March, 1829, assigned them separately to I. Ostrander, the complainant in this cause.

Shortly before the termination of the original lease, Livingston and wife agreed with Vernon, the assignee thereof, to pay

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him for the buildings upon the demised premises, and procured from him an assignment of all his interest in the lease and leasehold premises to one of their sons, M. Livingston, junior. Upon the expiration of the lease, Livingston and his wife claimed that the complainant was not entitled to pay for the buildings erected on these five subdivisions of the two lots, because they were not made in pursuance of the agreement with The Sterling Company, and with the covenants in the leases from that company to Brower; and refused to join in the appointment of appraisers of those two lots and the buildings thereon. They however offered to pay him what they considered the value of the buildings after deducting what they claimed as damages, because the buildings were not such as were contemplated in the agreement with The Sterling Company, and such as Brower in his leases covenanted to build.

Suits having been commenced against Ostrander and his tenants, to recover the possession of the two lots leased to Brower, the bill in this cause was filed to restrain the prosecution of those suits, and for a specific performance.

*J. M. Mason & B. F. Butler*, for the appellant. The complainant, on the case stated and the offers made in his bill, is entitled to the specific relief therein prayed for. He is assignee of the lessee in the original lease granted by the defendants to Holley, so far as relates to the two lots held by him as mentioned in the bill of complaint. As assignee of the lessee, for part of the demised premises, he has the same remedies upon the covenants contained in the original lease that an assignee of the lessee for the whole premises would have. The covenant contained in the original lease with regard to the improvements, or the sale of the lots at the expiration of the lease, is divisible in its nature; and can be performed in regard to a portion of the demised premises as well as to the whole. The covenant is binding on the lessor, in favor of the assignee of the lessee for part of the land. The agreement between the lessors and The Sterling Company did not take away any of the rights of the subsequent assignees from the company.



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Neither did the lease, and the acceptance thereof, from The Sterling Company, have that effect. In case the defendants refuse to appoint an appraiser of the improvements and lands, this court has the power to appoint an appraiser for them; or to have the improvements and lands valued under the direction of a master. The contract on the part of the lessee or his assigns having been performed by the payment of rent, and the buildings having been erected on the faith of the lessor's covenants in that behalf, the court will interfere to do justice between the parties, on the ground of part performance. If the court should refuse a specific performance of the covenant with regard to the improvements and the lands, the complainant is nevertheless entitled to compensation for the improvements, and the bill should be retained to ascertain his damages.

*G. Wood & A. Schell*, for the respondents. The complainant holds under a sub-lease executed by The Sterling Company under the agreement entered into between the company and the defendants, and not by assignment of the original lease. The covenants in the original lease in regard to buildings or improvements to be put upon the premises are not in reference to their subject matter inherent in or annexed to the premises as demised, and therefore are personal covenants not *per se* running with the land. But inasmuch as they appertain to the land, and relate to acts to be performed on the land, and are made expressly with the assigns, they are covenants with the assignees while they continue assignees, and in that respect run with the land. (*Spencer's case*, 5 *Coke's Rep.* 18. *Bally v. Wells*, 3 *Wils. Rep.* 25. *Gay v. Cuthbertson*, 2 *Chit. Rep.* 482.) Such covenants are allowable though the assignees as parties thereto, were not ascertained when the covenants were made, but arise in future; and covenants may shift in respect to the parties thereto, from time to time. (*Spencer's case*, 5 *Coke*, 18. *Willard v. Tillman*, 2 *Hill*, 276. *Norman v. Wells*, 17 *Wend.* 145, 159. *Fellows v. Gillman*, 4 *Id.* 414.) Such personal covenants are not *per se* divisible in respect

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to the subject matter thereof. (9 *Cowen's Rep.* 753, 754. 7 *Id.* 313.)

There is nothing in the contract or subject matter of the original covenants in the lease to vary the construction in this respect and to render them partible. Because, (1.) Although the original lease and covenants contemplate the future erection of several buildings on several lots, yet they do not provide for such buildings being erected by different assignees of separate parts of the premises. (2.) The supplemental agreement which was designed to provide for that case, shows it was not contemplated in the original covenants. The covenants in the original lease, (if they are still in full force,) do not warrant the complainant in seeking the relief prayed for in the bill, the defendants being entitled under those covenants to one entire appraisement and performance.

The agreement between The Sterling Company and the defendants was mutual, and binding upon both parties, and the company therein covenanted on behalf of themselves and their assigns that all buildings that might be erected on said premises should be placed on lots 25 feet by 100, and be of the character therein described. (*Barton v. McLane*, 5 *Hill*, 256. *Masterton v. Smith*, 7 *Id.* 61.) That agreement, though personal and in a separate instrument from the lease, was made with the assigns also, and was binding upon them as a covenant shifting and applying to them when their interest as such assignees accrued, and the assignees so understood it; as is evinced by the recitals in the subleases. (*Willard v. Silliman*, 2 *Hill* 276. 8 *Cowen*, 206.) These covenants modified the covenants in the original lease, and either restricted or entirely superseded them so far forth as they were incompatible. The appeal should be dismissed with costs; the complainants, who violated their supplemental agreement in every particular, having no equity or law in their case.

THE CHANCELLOR. It is perfectly evident that no such building has been erected, upon either of the lots leased to Brower, as was contemplated in the agreement between the

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defendants and The Sterling Company, or as Brower covenanted to build on each of those lots. True it was not required that the two story dwelling house with a brick front should cover the whole front of the lot of twenty-five feet in width. But the erection of such a house as is described in the agreement, if built partly on one lot and partly on the other, was not a compliance with the terms of that agreement, or with the covenants in the sub-leases, as to either of the lots. The complainant as the assignee of the interest of Brower, therefore, was not entitled to any benefit whatever under the agreement of January, 1827. For the covenant in that agreement in favor of the sub-lessees or assignees of particular lots, giving to them the right to an independent appraisal in reference to their improvements, was limited to such lots as should have been improved by such sub-lessees, or assignees, or those claiming under them, in the manner which was contemplated in that agreement.

The rights of the complainant, therefore, in reference to improvements, are no greater than they would have been if the agreement of January, 1827, had never been made. And the vice chancellor was right in supposing that under the covenant in the original lease the value of the whole leasehold premises, and the value of the whole of the improvements, were to be separately estimated; and that the lessors had the privilege of taking all the buildings at such valuation, or of conveying the whole of the premises demised, upon being paid the price at which the whole premises exclusive of improvements were valued; at their election. That covenant in the original lease, therefore, was in its nature indivisible. And if the entire interest of the lessee in distinct parcels of the demised premises had been assigned to different individuals, all who were interested in the performance of the covenant, or in the different parcels of the demised premises, must have united in the appraisal; and in the purchase of the whole premises, if the lessors elected to convey the same at such appraisal.

This covenant, however, was so far modified, in favor of the sub-lessees or assignees of particular lots who should comply

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with the terms of the subsequent agreement, as to exempt the lots, underlet or assigned to them respectively, from this general appraisal. The effect of the subsequent agreement, therefore, was the same as if the particular lots which were leased or assigned, and built upon in conformity to the terms of the agreement, had formed no part of the premises originally demised to Holley. The bill shows that several other of the lots, of 25 feet by 100 feet, into which the first parcel of the demised premises was subdivided by The Sterling Company, were sublet to different persons. But who such persons were, whether any buildings were erected on their respective lots, and if so, whether they were erected in conformity to the provisions of the agreement of January, 1827, does not appear. No relief, therefore, could be granted upon this bill, even if the complainant had made out a case entitling him to equitable relief in other respects.

M. Livingston, jun., who is the legal assignee of a part at least of the premises originally demised, so far as relates to this covenant for appraisal, &c. appears to be a necessary party to any bill for a specific performance of that covenant by the lessors. It is true, the bill alleges that the consideration of Vernon's assignment of the lease to him was in fact paid by the lessors. But that did not prevent the vesting of all Vernon's interest under the lease in him, in equity as well as at law; as there could be no resulting trust in favor of the original lessors, upon the facts disclosed. (*See 1 R. S. 728, § 51.*)

The decree of the vice chancellor allowing the demurrer, and dismissing the bill, must therefore be affirmed, with costs; but it must be without prejudice to the rights of the complainant, if he has any, in any future litigation.

## WILBER and others vs. COLLIER and others.

Where a judgment debtor dies before the judgment creditor has obtained an equitable lien upon his personal property by the filing of a creditor's bill, it cannot be reached by filing a bill of that nature against the widow and heirs of the deceased debtor.

The personal property belongs to the personal representatives of the decedent, and can only be reached by a proceeding against them. And if no other person will administer upon the estate, the judgment creditor should himself apply to the surrogate, and obtain letters of administration, and then apply the personal property of the decedent to the payment of debts in a due course of administration.

If his is the oldest judgment, such creditor will be entitled to priority over other creditors. But if there are older judgments, the fact that his execution had been returned unsatisfied before the death of his creditor will not entitle him to any preference.

*Aliter* if he has acquired a specific lien upon the property, by the levy of his execution thereon in the lifetime of the judgment debtor.

The fact that the widow and children of a deceased judgment debtor have taken possession of, and used, his personal property, after his death, will not authorize the judgment creditor to proceed against them by bill, to obtain satisfaction of the judgment; they not being liable to be sued as executors of their own wrong.

An ordinary judgment creditor's bill is not the proper remedy to reach real estate of a deceased judgment debtor, or an equitable interest in real estate, which has descended to his heirs at law.

If the decedent held the legal title, so that the judgment was a lien upon the land, the judgment creditor's proper course is to revive the judgment against the heirs or devisees of the decedent, and then to have the property sold upon execution. But if the decedent's interest in the real estate was a mere equitable interest, under a contract to purchase, or otherwise, which cannot be sold on execution, the judgment creditor, after exhausting his remedy against the personal representatives of the decedent, or ascertaining that they have no assets to pay his debt, should apply to the surrogate, to compel them to sell the equitable interest of the testator, or intestate, for the payment of his debts; as authorized by the revised statutes.

The creditors by judgment, or otherwise, may also reach an equitable interest in real estate, which their deceased debtor held under a contract to purchase, by a suit against his heirs to whom it has descended. But before they can do this, in addition to exhausting their remedy against the personal representatives of the decedent, or showing by their bill that there was no personal estate to pay the debts, they must wait until the expiration of three years from the time of granting letters testamentary or of administration.

Where it appears that the complainant is entitled to relief, but his bill is not properly framed to obtain such relief, the bill should not be dismissed absolutely; but it should be dismissed without prejudice to his rights in any future litigation.

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Wilber v. Collier.

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THIS was an appeal, by the complainants, from a decree of the vice chancellor of the eighth circuit, dismissing their bill as to the defendant J. Howell, and the infant children and heirs of T. Collier deceased. N. Wilber, one of the complainants, in May, 1837, recovered a judgment, in the supreme court, against J. L. Collier and T. Collier, for about \$1300, upon which an execution was issued to the sheriff of the county where the defendants therein resided, and the same was afterwards returned unsatisfied, in October of the same year. Finch and Harmon, the other two complainants, also recovered a judgment, at the same time and in the same court, against J. L. and T. Collier, for about \$560; upon which an execution was issued and returned unsatisfied, in the same manner. At the time of the return of these executions, T. Collier, one of the judgment debtors, had considerable personal property, which had been sold under a previous execution against him, but which had again become his under an arrangement made with the purchaser thereof. He also was entitled to a conveyance of about 130 acres of land, from the defendant J. Howell, upon the payment of certain advances which had been made by Howell, to pay for the land upon the contracts which T. Collier held therefor at the time of the recovery of the before mentioned judgments, and for other moneys paid and advanced upon the purchase of his personal property at the sheriff's sale; Howell having taken the legal title to the land, under an arrangement made between him and T. Collier.

Immediately after the return of their respective executions, the complainants filed a creditor's bill against their judgment debtors; and Howell was made a defendant in that suit, for the purpose of reaching T. Collier's interest in the 130 acres of land, upon the payment of the amount due thereon to Howell. That bill was subsequently dismissed, without prejudice to the rights of the complainants, on account of some formal defect in the statement of the issuing of their executions. T. Collier having died, the bill in the present suit was filed, in August, 1840, less than three years after his death; and J. L. Collier, the surviving judgment debtor, and Howell who held the legal title to the

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Wilber v. Collier.

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and, and the widow and children of T. Collier the deceased judgment debtor, were made defendants therein. The infant defendants put in the usual general answer, by their guardian ad litem. Howell also put in an answer contesting the rights of the complainants; and the cause was heard upon pleadings and proofs as to those parties.

*S. Boughton*, for the appellants.

*M. F. Delano*, for the respondents.

THE CHANCELLOR. The vice chancellor probably came to the correct conclusion, that as between the defendant Howell and T. Collier, at the time of the death of the latter, Collier was entitled to a conveyance of the 130 acres of land, upon paying to Howell the amount of his bid upon the personal property which was given up, and the amount of his advances to obtain a conveyance of the legal title to the land; together with interest on those sums, and the amount of his expenses and other disbursements in procuring that title. But the complainants' solicitor clearly mistook the course of proceeding necessary to be pursued, after the death of T. Collier, to reach the personal property which belonged to him at the time of his death, and which remained in the hands of his widow and children at the time of filing the bill in this suit. And he also mistook his remedy to reach the interest of the decedent in the 130 acres of land; which interest became vested in the heirs at law of T. Collier at his death.

Where the judgment debtor dies before the judgment creditor has obtained an equitable lien upon his personal property, by the filing of a creditor's bill, it cannot be reached in that way. The property belongs to the personal representatives of the decedent, and can only be reached by a proceeding against them. And if no other person will administer upon the estate, the judgment creditor should himself apply to the surrogate and obtain letters of administration, and then apply the personal property of the decedent to the payment of debts in a due course

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of administration. If his is the oldest judgment, he will be entitled to priority in payment over other creditors. But if there are older judgments, the fact that his execution had been returned unsatisfied does not entitle him to any preference. It would be otherwise if he had acquired a specific lien upon the property, by the levy of his execution thereon in the lifetime of the judgment debtor. For the sheriff, in that case, could proceed and sell the property, upon the execution, notwithstanding the death of the party against whom such execution had issued.

Nor did the fact that the widow and children of T. Collier had taken possession of and used his personal property, after his death, authorize the complainants to proceed by bill against them to obtain satisfaction of the debt. For, under the provisions of the revised statutes, persons who have wrongfully possessed themselves of the property of a deceased debtor cannot be sued, by the creditors, as executors of their own wrong; but are liable to account for such property to the rightful executor, or administrator, when one shall have been allowed, or appointed, by the surrogate. (2 R. S. 449, § 17.)

Again; an ordinary judgment creditor's bill is not the proper remedy to reach real estate of a deceased judgment debtor, or an equitable interest in real estate which has descended to his heirs at law. If the decedent at his death held the legal title, so that the judgment was a lien upon the property, the judgment creditor's remedy is to revive the judgment against the heirs or devisees of the decedent, and then to have the property sold upon execution. But if the decedent's interest in the real estate was a mere equitable interest, under a contract to purchase, or otherwise, which cannot be sold on execution, the judgment creditor, after exhausting his remedy against the personal representatives of the decedent, or ascertaining that they have no assets to pay his debt, should apply to the surrogate to compel them to sell the equitable interest of their testator or intestate, for the payment of debts; as authorized by the revised statutes. (2 R. S. 108, § 48. *Idem*, 111, § 66.)

The creditors by judgment or otherwise, may also reach an equitable interest in real estate, which their deceased debtor



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held under a contract to purchase, by a suit against his heirs to whom it has descended. But before they can do this, in addition to exhausting their remedy against the personal representatives of the decedent, or showing by their bill that there was no personal estate to pay their debts, they must wait until the expiration of three years from the time of granting letters testamentary or of administration. (2 R. S. 109, § 53.) The revised statutes having changed the whole course of the proceedings in this court by creditors, against heirs and devisees, to reach the real estate, or an equitable interest in real estate, of their deceased debtor, in the hands of his heirs or devisees, decisions upon cases of that kind previous to January 1830, are not applicable to cases which have arisen since that time. This bill was so defective that it was impossible to give any relief to the complainants therein as against the respondents. But as they succeeded in showing that they had rights which might be made available not only as against Howell but also against the heirs at law of their deceased debtor, at some future time, if they were not able to obtain satisfaction of their debts out of the personal estate of the decedent by a proper proceeding, the bill should not have been dismissed absolutely; but the decree dismissing the bill with costs, as to the respondents, should have been without prejudice to the rights of the complainants in any future litigation. The decree appealed from must therefore be corrected in this respect. And with this slight modification it must be affirmed with costs.

## NEWLAND vs. ROGERS.

**Multifariousness**, properly speaking, is where different matters, having no connection with each other, are joined in a bill against several defendants, a part of whom have no interest in, or connection with, some of the distinct matters for which the suit is brought; so that such defendants are put to the unnecessary trouble and expense of answering and litigating matters stated in the bill, in which they are not interested, and with which they have no connection.

A simple misjoinder of different causes of complaint, between the same parties, and which causes cannot conveniently and properly be litigated together, is sometimes called multifariousness; but the ground of objection, in such cases, depends upon an entirely different principle from multifariousness, properly so called, and is a mere question of convenience.

The court of chancery abhors a useless multiplication of suits between the same parties, and endeavors to prevent it, as far as practicable. Hence it will not allow separate bills to be filed for different parts of the same account, between the same parties; although the account relates to transactions which are not necessarily connected with each other.

Accordingly, to sustain the objection that several distinct matters and causes of complaint between the same parties, are improperly joined in the same bill, such matters must be of such different natures, or the forms of proceeding in relation to such several matters must be so different, that it would be improper, or very inconvenient, to litigate the same in one suit.

There is no general principle, of the court of chancery, that distinct matters, between the same parties, who sue or are sued in the same right or capacity, cannot be united in the same bill. On the contrary, it is settled that matters of the same nature, between the same parties, although arising out of distinct transactions, may properly be joined in the same suit.

THIS was an appeal from a decretal order of the late vice chancellor of the third circuit, overruling the demurrer of the defendant to the bill of complaint in this case.

The bill stated that in 1836 the complainant and the defendant commenced the business of buying and selling spars, ship timber, and other lumber for the New-York and other markets, on joint account, and to share equally in the profits and loss. Several quantities of lumber were purchased and sold, on some of which there was a profit and on some a loss, and that something was lost by bad debts; that in 1837 the parties had a settlement of this lumber transaction, in which three important errors occurred, against the complainant, which were particu-

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arly stated in his bill, and that other errors occurred in that settlement. The bill also stated that in 1836 the complainant and the defendant also were engaged in the business of purchasing standing timber and timber lands in the state of Pennsylvania, and in buying timber to be taken down the Susquehannah river, which business was carried on for them by an agent, and that the titles to most of the standing timber and timber lands were taken in the name of the defendant alone, or had been transferred to him by the agent in whose name the same were originally taken, but the title to one lot was taken in the name of the complainant; and that upon a partial settlement of that transaction, a considerable sum was found due to the complainant for his advances and disbursements; and that the complainant was also entitled to be allowed for several other sums, for expenses and disbursement in relation to the Pennsylvania transactions which were not brought into that partial settlement; a schedule of which sums was annexed to the bill of the complainant. The bill further stated that the defendant had in his possession two promissory notes of the complainant, dated in November, 1841, payable to the order of the defendant in eight and ten months, which notes were given and delivered to the defendant to be used in a timber trade for their joint benefit, if the said trade should be consummated; but which was never done, so that such notes were wholly without consideration; but that the defendant refused to give them up, and claimed to hold them as evidences of debts due from the complainant.

The complainant therefore prayed that the defendant might be decreed to account and settle with him for the several mistakes and omissions in the settlement of 1837, relative to the first mentioned lumber transactions; and to pay him the half of his expenditures and disbursements on account of the Pennsylvania purchases, which had not been paid, as mentioned in the schedule annexed to the bill, and to convey to him the one half of the Pennsylvania standing timber and timber lands which were held by the defendant in his own name; the complainant offering to convey to the defendant the half of the lot standing

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in the name of the complainant ; and that the defendant might be decreed to surrender up and cancel the two notes of November, 1841 ; or that the complainant might have such further or other relief as the nature of his case might require and as was agreeable to equity.

The defendant demurred to the whole bill, for multifariousness ; stating as cause of demurrer that the bill was exhibited for several distinct causes and matters which were of different natures, in no way connected with each other, but wholly disconnected, and having no reference or relation to each other. The vice chancellor decided that the demurrer for multifariousness was not well taken ; from which decision the defendant appealed.

*E. H. Rosekrans*, for the appellant.

*David Buel*, for the respondent.

THE CHANCELLOR. There does not appear to be any necessary connection between the business of purchasing standing timber, and timber lands and timber to be floated down the Susquehannah, in the state of Pennsylvania, by the parties to this suit, which business was carried on through their agent Patchin, and the business of buying and selling lumber for the New-York market, which was carried on by the parties themselves, or by the complainant for himself and Rogers, in this state. Nor is the giving of the two notes, as stated in the bill, necessarily connected with either of the other transactions ; though the notes were given for the purpose of enabling the defendant to consummate a lumber trade on the joint account of the parties.

The appellant's counsel is wrong, however, in supposing that two distinct and independent matters or claims, by the same complainant against the same defendant, cannot properly be united in one bill. Multifariousness, properly speaking, is where different matters, having no connection with each other, are joined in a bill against several defendants, a part of whom

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have no interest in, or connection with some of the distinct matters for which the suit is brought; so that such defendants are put to the unnecessary trouble and expense of answering and litigating matters stated in the bill, in which they are not interested, and with which they have no connection. But a simple misjoinder of different causes of complaint, between the same parties, which causes cannot conveniently and properly be litigated together, is sometimes called multifariousness; though the ground of objection in such cases depends upon an entirely different principle; and is a mere question of convenience in the administration of justice. In cases of strict multifariousness the objection to the form of the bill is based upon the evident impropriety of compelling a part of the defendants to answer and litigate matters in which they are not interested, and which are not so connected with matters in which they are interested, as to render it proper, for the convenient administration of justice, to litigate and dispose of the whole in one suit. But the court of chancery abhors a useless multiplication of suits between the same parties, and endeavors to prevent it, as far as practicable. For this reason the court will not allow separate bills to be filed for different parts of the same account between the same parties; although the account relates to transactions which are not necessarily connected with each other. (*Purefoy v. Purefoy*, 1 *Vern. Rep.* 29.) Therefore, to sustain the objection that several distinct matters and causes of complaint between the same parties are improperly joined in the same bill, such matters must be of such different natures, or the forms of proceeding in relation to such several matters must be so different, that it would be improper, or very inconvenient, to litigate the same in one suit. For there is no such general principle in the court of chancery, that distinct matters between the same parties, and who sue or are sued in the same right or capacity, cannot properly be united in the same bill. On the contrary, there are several cases in which it has been held that matters of the same nature, and between the same parties, although arising out of distinct transactions, may be joined in the same suit. These cases are mostly referred to in the well

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considered opinion of Lord Cottenham, in *Campbell v. Mackay*, (1 *Mylne & Craig's Rep.* 616.) And his lordship notices, particularly, the decisions of the vice chancellor and of Lord Brougham, in the case of *The Attorney General v. The Merchant Tailor's Company*, (1 *Myl. & Keen's Rep.* 189.) In that case an information was filed to establish eight charitable trusts created by different persons between the years 1518 and 1682. And although the objects of the several trusts were not the same, and the trust moneys in some of them were to be loaned without interest, and in others upon interest, but at different rates, yet as the general objects of the various trusts, except one, were in favor of the members of the company or of its poor members, or the widows and orphans of deceased members, the court held that seven of the charitable trusts were properly joined in the same information. But in relation to the eighth trust, as another corporation was interested in the trust and was a necessary party to the suit to establish that trust, but had no connection whatever with the other seven trusts, the court permitted the information to be amended by striking out what related to that trust; leaving it to stand as a valid information as to the other seven.

In the case under consideration there is no difficulty in joining all the matters of the bill in one suit, so far as the complainant is entitled to equitable relief in relation to them; and it will save expense and facilitate the settlement of the several matters in controversy by the decree of the court, to have them all litigated and settled together. For if the allegations in the bill are true, the defendant is indebted to the complainant, as well upon the joint concern between them in relation to the purchase of lumber and standing timber and timber lands in the state of Pennsylvania, as upon the business of purchasing and selling lumber here in 1836. And an account must be taken in relation to both transactions. Nor is there any difficulty in giving to the complainant the additional relief sought; by directing the conveyance to him of the one half of the standing timber and the timber lands in Pennsylvania, or so much thereof as may remain after paying, out of the proceeds of a sale of a part

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thereof, the balance which may be found due to him for his expenses and disbursements upon the purchase thereof, beyond his proportionate share.

In relation to the two notes, I am inclined to think there is no ground for equitable relief, if they remained in the hands of the defendant at the time of the commencement of the suit. For as they had been long past due, they could not be transferred to a third person, so as to constitute him a bona fide holder thereof. And upon the statement in the bill, the defendant could not have recovered thereon in his own name; and a discovery from him is waived by the bill. That, however, was a proper ground of demurrer to that part of the bill only, for want of equity. And it cannot lay the foundation for an objection to the whole bill for multifariousness; or for a misjoinder of distinct subjects of equitable relief. On the other hand, if the defendant had sold the notes to a bona fide purchaser, then the amount of them formed a proper subject of account between the complainant and defendant, upon the other facts stated in this bill. The case of *Boyd & Suydam v. Hoyt & Parsel*, (5 *Paige's Rep.* 65,) as well as most of the other cases relied on by the counsel for the appellant, were cases of multifariousness properly so called; where some of the defendants who were interested in one of the distinct causes of complaint mentioned in the bill, had no connection with, and no interest in, the other causes of complaint as to which their co-defendants alone were proper parties.

In this case there is no sufficient reason for declaring that all the matters of this bill cannot conveniently and properly be litigated in one suit, so far as they are proper subjects of equitable cognizance. The vice chancellor was therefore right in disallowing the demurrer. And the decretal order appealed from must be affirmed with costs.

BANKS and others, executors, &c. *vs.* WALKER and others.

[Overruled, 5 N. Y. 263.]

It is a principle of the common law, that an alien can neither inherit lands himself from a person who is not an alien, nor transmit lands by descent to any other person. Nor, by the common law, could a natural born subject or citizen transmit lands by descent to another mediately, through the blood of an alien. Thus in the case of grandfather, father and son, if the father was an alien, whether he was or was not living at the time of the descent cast, the grandfather could not transmit lands by descent to the grandson, although both of them were natural born subjects or citizens, or had been duly naturalized. But if the person who died seised of real estate had inheritable blood, such real estate would descend to his next heir who had such inheritable blood, although the person who would otherwise have been the heir of the decedent was an alien.

Thus if the deceased had two sons, and the eldest was an alien, and the youngest was a natural born subject or citizen, the alienage of the eldest son, who otherwise would have been the heir at law of his father, would not prevent the real estate of the father from descending to the youngest son, as heir at law.

And by the common law of England, the alienage, or attainder, of the father did not prevent one of his sons from inheriting directly from another son.

The 22d section of the chapter of the revised statutes, relative to the descent of real property, which provides that no person capable of inheriting under the provisions of that chapter, shall be precluded from such inheritance by reason of the alienism of any *ancestor* of such person, is broad enough to remove a disability arising from the alienism of the father and grandfather of the person claiming the inheritance; but it does not remove the disability of a person who, in tracing his pedigree and consanguinity as collateral heir of the person dying seised of the premises, must trace it mediately through the blood of the father of the latter, an alien; and who was not an *ancestor* of the claimant.

Where it is clearly inferable from a record of naturalization that the alien had not, at least three years previous to the date thereof, declared on oath his intention to become a citizen of the United States, and to renounce all allegiance to any foreign prince or sovereignty, and particularly to the king of the country of which he was a subject, as required by the act of 1802; but that the court has mistaken the registry of the arrival of the alien in the United States, for such a declaration of intention, *it seems* the naturalization is invalid.

But if such record is valid, upon its face, it is conclusive as to the regularity of the proceedings, and of the naturalization of the alien. And such record cannot be contradicted by extrinsic proof that no such declaration of intention had in fact been made.

The complainant, in a foreclosure suit, cannot make a person who claims the mortgaged premises adversely to both the mortgagor and the mortgagee a party defendant in such suit. And if he does so, and the fact of such adverse claim appears from the complainant's bill, the party thus made a defendant may demur to the bill for want of equity as to such defendant.

Where real estate is sold at auction and without warranty as to the title, and is con-



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veyed accordingly, and a bond and mortgage is taken back for the purchase money, it is no defence to a suit to foreclose the mortgage that the title failed in part; where there was no fraud or misrepresentation on the part of the mortgagee, and where the property was put up and sold at the risk of the purchaser.

THIS was an appeal, by J. Walker, one of the defendants, from a decree of the late vice chancellor of the first circuit. The bill was filed by the executors of Eliza McCarthy deceased, who was the widow of the late Denis McCarthy of the city of New-York, to foreclose a mortgage given to her, for a part of the purchase money of a house and lot on the east side of Broadway, upon which a part of the Carlton House is now built; which mortgage was given by the appellant under the following circumstances:

Denis McCarthy was born in Ireland, of parents who were domiciled there, and who with their ancestors were British subjects, and continued to be so until the time of their deaths. He came to this country at an early day, and was a citizen of this state at the time of his death in July, 1835. He died seised of the premises in question, without any issue surviving him, but leaving a widow who was entitled to dower in his real estate, and his sister Joanna Bant, an alien, who survived him. The widow supposing the real estate of her deceased husband had escheated to the state, subject to her right of dower therein, applied to the legislature for a release of the interest of the state therein. The act of May, 1836, was thereupon passed, which authorized the commissioners of the land office to release to her the interest which the state had acquired by escheat, on condition that the premises, including her dower therein, should be sold under the direction of the vice chancellor of the first circuit, and that the net proceeds of the sale, after deducting costs and charges and the commutation money which was to be paid into the state treasury, should be equally divided between her and Mrs. Bant, the sister of the decedent. And upon the payment of \$1344, by the widow, for the amount of the commutation money to the state, the commissioners of the land office released to her all the interest which the state had acquired in the premises by the escheat.

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The vice chancellor thereupon made an order for a sale of the premises at public auction, under the direction of Master T. A. Emmett, upon three weeks' notice, to be published in two daily papers, and upon such terms and conditions as the master should prescribe, and that the master and Mrs. McCarthy should execute conveyances therefor to the purchaser or purchasers, in such form as the master should prescribe; and that the master, out of the proceeds of the sale, should pay the costs and expenses of the proceedings, and refund to Mrs. McCarthy the amount paid by her to the state for commutation money, and divide the residue of such proceeds equally between her and Mrs. Bant. In pursuance of that order the premises were advertised and sold by the master, in November, 1836, to J. Walker, the appellant in this cause, for the sum of \$38,500; which sale was confirmed by the vice chancellor, upon a report thereof made by the master. And on the 14th of December, 1836, the master and Mrs. McCarthy conveyed the premises to the purchaser, in pursuance of such sale; by a deed containing covenants only against their own acts and incumbrances. Upon the execution of that conveyance, Walker gave to Mrs. McCarthy the bond and mortgage in this case for the one-half of the whole purchase money, payable in two years with semi-annual interest; she having paid her half of the expenses and commutation money out of her own funds. He also secured to Mrs. Bant her proportion of the other half of the purchase money, which he subsequently paid; and he paid the other half of the commutation money and expenses to the master. He subsequently paid \$250 of the principal of Mrs. McCarthy's bond and mortgage, leaving \$19,000 still due; upon which he continued to pay the semi-annual interest until the 14th of December, 1842, inclusive.

In June, 1843, Denis McCarthy, of Oneida county, who claimed to be a collateral heir of Denis McCarthy deceased, brought an ejectment suit against the tenants of Walker, to recover possession of the mortgaged premises. And Walker having declined paying any thing more upon his bond and mortgage until the final result of that suit should be ascertained,

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and the mortgagee having died, her executors, in August, 1843, filed their bill in this cause to foreclose and obtain satisfaction of the bond and mortgage. The defendant Walker, in his answer, admitted the sale to him; and the giving of the bond and mortgage to Mrs. McCarthy to secure the payment of one half of the purchase money of the premises. But he set up, as a defence to the suit, that at the time of the sale she represented to him that all the heirs at law of Denis McCarthy, her deceased husband, at the time of his death were aliens, so that his real estate had escheated to the state, subject to her right of dower therein, and had been released to her pursuant to the directions of the act aforesaid; but that since the sale, and the giving of the bond and mortgage, he had been informed and believed that such representations were untrue; that Denis McCarthy of Oneida county, who had been naturalized in 1834, in the court of common pleas of Saratoga county, was an heir at law of her deceased husband and became entitled to his real estate, as such heir, at the time of his death in July, 1835; and that Mrs. McCarthy well knew the same when she made such representations to the defendant Walker, at the time of the sale, and also at the time she presented her petition to the legislature.

The defendant Walker further alleged, in his answer, that Denis McCarthy of Oneida county had commenced a suit, in the supreme court, against the tenants of Walker, to recover the possession of the mortgaged premises, as the heir at law of Denis McCarthy of New-York, deceased, which suit was still pending; that previous to the filing of the bill in this cause the defendant Walker had notified the complainants of the ejectment suit, and of the claim made by the plaintiff therein; and had requested that the said plaintiff might be made a party to the bill of foreclosure, so that the validity of his claim to the property might be investigated and determined in this suit. The defendant Walker therefore insisted that he was not bound, and ought not to be compelled to pay the amount of his bond and mortgage to Mrs. McCarthy; and that the complainants, as her representatives, were not entitled to enforce the payment

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thereof, or have a decree of foreclosure and sale of the mortgaged premises, until a release of the claim of Denis McCarthy of Oneida county had been obtained, or until it should be determined, by the trial of the ejectment suit brought by him, that his claim to the premises, as an heir at law of Denis McCarthy deceased, was unfounded.

The plaintiff in the ejectment suit was examined as a witness for Walker, in this suit, and stated that he came to this country from Ireland in 1827, his father and mother then being dead, and his two brothers and eight sisters then residing in Ireland; that he was naturalized in the court of common pleas of Saratoga county in 1834; and that from recent information which he had obtained from the letters of aged people in Ireland he believed his grandfather, or father, was a cousin of the late Denis McCarthy of New-York. A copy of the record of his naturalization in Saratoga county was also read upon the hearing, and also the deed from Master Emmet and Mrs. McCarthy to Walker; the recitals in which deed, as the counsel for the appellant insisted, were evidence of false representations made by her that the heirs at law of her deceased husband were all aliens. But no evidence whatever was given that she was aware, or had any reason to believe, that any relatives whatever of her deceased husband had come to this country and been naturalized previous to his death. Nor was there any evidence that she was present at the master's sale, or made any representations whatever to the defendant Walker, at or previous to the sale, relative to the validity of the title to the premises which were about to be sold.

The vice chancellor, upon the hearing of the cause, made the usual decree for the foreclosure of the mortgage and a sale of the mortgaged premises, to satisfy the amount due and the costs of the suit; and the usual decree over against the mortgagor for the payment of the deficiency, if any, upon the coming in and confirmation of the master's report.

*J. R. Whiting & R. Lockwood*, for the appellant. The deed to Walker, and the bond and mortgage executed by him

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to Mrs. McCarthy to secure the balance of the purchase money, were all executed upon a mistake of fact—at the least as to the recital in the deed “that Denis McCarthy died leaving several persons his heirs at law him surviving—all of which persons were aliens, not naturalized or authorized to hold real estate within the state of New-York, &c. by means whereof the said lot, piece, &c. escheated to the people of the state of New-York subject to the dower of the said Elizabeth.” The answer and proofs now show that an heir at law, naturalized and capable of holding real estate, did exist at the death of the testator. Mrs. McCarthy was bound by this recital. If untrue, although she did not know it to be so, she is nevertheless responsible, however innocent. (*Champlin v. Laytin*, 6 Paige, 189. 18 Wend. 407, S. C.) The action of ejectment, being brought to the notice of the executors, it was their duty to defend it, if they wished to preserve their lien on the lands. If the defendant be evicted, he will clearly be entitled to relief against the mortgage, if it remain unpaid. The contract is still *executory*, and therefore if the defendant show a case in which the court would refuse a decree for specific performance, he is entitled to the same equitable protection of the court as if a bill were filed against him for a specific performance of a contract of purchase. On a bill for such a specific performance there cannot be a doubt that he would be relieved against his purchase. At all events, the bill would be retained until the title of the vendor was fully established in the suit at law. There is no case to be found where a court of equity has compelled a purchaser to complete a purchase, where an ejectment, even upon mere colorable grounds, was subsequently commenced to recover the land under title paramount. Here we have the expense of defending the suit, and the risk besides, and the case is still stronger in our favor. The case of a mortgagor liable to be so evicted, when the recitals in the deed have misled him, and have been the foundation of his purchase, becomes the case also of the party who has received his money, and that party is equally bound in equity to await the issue of the contest as to the balance due. The court ought to interfere to protect the

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defendant here, as a mere matter of discretion and indulgence. The court has a right to delay a decree, under circumstances like those here presented, as long as the equity of the case may require. The complainants can suffer no possible injury if their title be good. (*Abbott v. Allen*, 2 *John. Ch. Rep.* 519. 3 *Powell on Mort.* 993, 9. *Johnson v. Gere*, 2 *John. Ch. Rep.* 546. *Gillespie v. Moon*, 2 *Idem*, 585.) The complainants are not vendors seeking a foreclosure against a vendee guilty of negligence, of mistake of law, or of any other omission or act, upon which courts of equity have refused relief to mortgagors upon bills for foreclosure.

*W. S. Sears*, for the respondents. The mortgage to Joanna Bant having been paid off ought to be decreed to be satisfied of record by the defendant Christopher Bant, the administrator of Joanna Bant. The premises should be sold free and discharged from the mortgage to Mrs. Joanna Bant. The defendant has failed to prove his defence set up in answer. The complainant's right to the money secured by the mortgage is determined by the decree; and the defendant appeals only from so much of the decree as directs the mortgaged premises to be sold. The court will not, after the rights of the parties have been determined by the decree, reverse that part of the decree by which the complainants are to have the benefit of the judgment of the court. That part of the decree of the assistant vice chancellor which is appealed from should be affirmed, and the complainants permitted to proceed under the decree and sell the mortgaged premises.

THE CHANCELLOR. The first and most important question in this case, admitting that the plaintiff in the ejectment suit was duly naturalized in 1834, and that he sustained the relationship which he supposes he did to Denis McCarthy deceased, is whether he could take real property by descent from the decedent, under the provisions of the revised statutes; the parents of Denis McCarthy deceased never having been citizens of the United States.

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It is a well known principle of the common law that an alien can neither himself inherit lands from a person who is not an alien, nor can he transmit lands by descent to any other person. Nor by the common law could a natural born subject or citizen transmit lands by descent to another, mediately, through the blood of an alien. Thus in the case of grandfather, father and son, if the father was an alien, whether he was or was not living at the time of the descent cast, the grandfather could not transmit lands by descent to his grandson; although both of them were natural born subjects or citizens, or had been duly naturalized. But if the person who died seised of real estate had inheritable blood, such real estate would descend to his next heir who had such inheritable blood; although the person who would otherwise have been the heir of the decedent was an alien. Thus if the deceased had two sons, and the eldest was an alien and the youngest was a natural born subject or citizen, the alienage of the eldest son, who otherwise would have been the heir at law of his father, would not prevent the real estate of the father from descending to the youngest son, as heir at law. These principles of the common law are admitted by all the English judges who delivered opinions in the important case of *Collingwood v. Pace*, in the exchequer chamber, in May, 1664. (1 *Vent. Rep.* 413. *O. Bridgman's Rep.* 414. 1 *Sid. Rep.* 194. 1 *Keble*, 579, 581, 485, 588, 603, 605, 670, 671, 699, 705.) The only question upon which Sir Orlando Bridgman and two other judges differed with Lord Chief Baron Hale and the six other judges was, whether the descent from one brother to another was immediate, or was only through their father who was an alien. The opinion of the lord chief baron prevailed in that case, and upon that question; so that it became the settled law in England that the alienage or attainder of the father did not prevent one of his sons from inheriting directly from another. Lord Hale, however, in his opinion, as reported at length by Ventris, says the descent between brothers differs from all other collateral descents whatsoever, and is immediate; and to entitle them to inherit from each other they must be of the whole blood. That the uncle is preferred in descent before the brother of the

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nalf blood, because that is a mediate descent, *mediante patre*. (1 *Vent.* 424.)

This disability of natural born or naturalized subjects to inherit from each other, where they were obliged to trace their pedigree or relationship through the blood of an alien, was removed, however, in England, by the statute 11 and 12 William 3, chapter 6. (1 *Evans' Stat.* 228.) But that statute, as it was decided by the court for the correction of errors in the case of *Jackson v. Fitz Simmons*, (10 *Wend. Rep.* 9,) was never in force in this state. And the question now arises, whether the twenty-second section, of the chapter of the revised statutes relative to the descent of real property, is broad enough to cover the case now under consideration. That section provides that no person capable of inheriting under the provisions of that chapter shall be precluded from such inheritance by reason of the alienism of any ancestor of such person. (1 *R. S.* 754.) This unquestionably removed the disability arising from the alienism of the father and grandfather of Denis McCarthy of Oneida county, the plaintiff in the ejectment suit which has been brought for the recovery of the mortgaged premises. But to enable him to trace his pedigree and consanguinity as collateral heir to Denis McCarthy, the decedent, who died seised of the mortgaged premises, he must trace it mediately through the blood of the father of the latter, an alien; and who was not an ancestor of the person who is now claiming to be the heir a. law of the decedent. Thus in the case of Edward Courtenay, great grandson of Edward the 4th, and whose father and grandfather had been attainted of treason, it was held that previous to the act restoring him in blood, his second and third cousins, the descendants of his four great aunts, who were his next of kin of the blood of his father and grandfather, could not have inherited from him; because they would have been compelled to trace their pedigree and relationship to him through the attainted blood of his father and grandfather. (3 *Coke's Inst.* 241.)

I am aware that the term *collateral ancestors* is sometimes used to designate uncles and aunts, and other collateral antecessors of the person spoken of; who are not in fact his an



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cestors. But the word *ancestors*, in its ordinary import and meaning, only includes those from whom the person spoken of is lineally descended, either on the father's or the mother's side. And whenever this word is intended to be used in a sense which is different from its ordinary import of lineal ascendants, or in such enlarged sense of antecessors, so as to embrace all the blood relatives of the person referred to who have preceded him, it is qualified, or enlarged, by some other term; to show that it is not used in its natural sense merely. Thus in the act of October, 1553, which restored in blood the son of Henry Courtenay, the attainted Marquis of Exeter, he is restored in blood as well as son and heir to his father the Marquis, as to all and every other *collateral and lineal* ancestor. The term ancestor is enlarged in the same way in the statute 11 and 12 William 3, ch. 6, before referred to. And there are also other words used in the statute last referred to, showing clearly the intention of the lawmakers to remove the disability arising not only from the alien blood of the ancestors of the person claiming to be entitled to real estate by descent, but also from the alienage of the ancestors of the deceased person who was last seized of the estate. For that statute declares that all and every person or persons, being natural born subjects, shall and may lawfully inherit, *and be inheritable*, as heir or heirs, to any honors, manors, lands, tenements or hereditaments, and may make their pedigrees and titles by descent from any of their ancestors *lineal or collateral*; although the father or mother, or other ancestor, of such person or persons, by, *from*, through or under whom he, she or they shall make or derive their title or pedigree was, is, or shall be, an alien, &c. (1 *Evan's Stat.* 229.)

The disability of blood of the ancestors of the person *from* whom the inheritance is to come, being removed, by that statute, in express terms, as well as the disability of the ancestors of the person claiming such inheritance as heir, the estate, in England, descends in the same manner as if all the ancestors, either of the deceased or of his heir at law, through whom it is necessary for such heir to trace his relationship by blood to the decedent, had been natural born subjects. But as our statute only removes

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only the disability of the alienism of ancestors of the person *claiming the inheritance* from the person last seised, it does not enable the claimant, in this case, to make his title and pedigree mediately through the alien blood of the father of Denis McCarthy the decedent, who was not an ancestor of such claimant.

Again ; I have doubts whether the alleged naturalization of the claimant is not fatally defective, if the certificate produced on the argument is a correct transcript of the record of naturalization. For it appears to show, upon its face, that a declaration of intention had not been made three years before, as required by the first clause of the first section of the act of April, 1802, to establish an uniform rule of naturalization ; but that the alien had only reported his arrival in the United States, which he was not required to do, subsequent to the act of May, 1828. (4 *Story's Laws*, 2145.) The last mentioned act having repealed the first section of the act of March, 1816, which required the certificate of the declaration of intention to be recited at full length in the record of naturalization, it is only necessary to state the fact that such previous declaration had been made. And the record of naturalization will then be conclusive evidence of the regularity of the proceedings, and that all the preliminary steps had been complied with ; provided such record does not show the contrary upon its face. But in this case I am inclined to think the record, upon its face, shows that what was supposed to be a declaration of intention under oath, was nothing but the registry of the arrival of the alien within the United States ; which was formerly required to be made, under the second section of the act of 1802, before that section was repealed in May, 1828. The certificate produced upon the hearing before me is in such an imperfect form, however, that it is difficult to say precisely what did form the record of naturalization. For that reason I do not intend to express any definite opinion upon the question as to the validity of the naturalization of the claimant. If, as I suppose, however, it is clearly inferable from the record of naturalization that the alien had not, at least three years before his admission by the court of common pleas in Saratoga county, declared on oath his in-

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tion to become a citizen of the United States, and to renounce all allegiance to any foreign prince or sovereignty, and particularly to the king of Great Britain, by name, as required by the act of 1802; but that the court had mistaken the registry of the arrival of the alien in the United States for such declaration of intention, I think the naturalization is invalid. If the record upon its face is valid, however, it is conclusive as to the regularity of the proceedings, and of the naturalization of the alien; and such record cannot be contradicted by extrinsic proof that no such declaration of intention had in fact been made.

But even if the plaintiff in the ejectment suit was duly naturalized, and could claim as heir at law of Denis McCarthy the decedent, through the alien blood of the father of the latter, it formed no valid defence to this foreclosure suit. For the defendant Walker wholly failed in establishing the allegation in his answer, that Mrs. McCarthy falsely and fraudulently represented to him, at or before the sale, that all the heirs at law of her deceased husband were aliens at the time of his death; so that his real estate had escheated. Even if she had made representations of that kind to him, the fact that she had made them in her petition to the legislature, affords presumptive evidence that she really believed such to be the case; and there is no proof to the contrary. Nor is there any evidence that she ever saw or spoke to the appellant, at or before the master's sale, or that she had any communication whatever, written or oral, with him. His bid upon the property at such sale could not have been affected by the formal recitals contained in a deed which was given some weeks afterwards. And as the property was sold without warranty, the purchaser took the same at his own risk. He cannot therefore refuse to pay the share of the purchase money which belonged to Mrs. McCarthy merely because the interest which he supposed he was acquiring in the property failed in part; and while he continues to possess and enjoy the property under his purchase.

Here the title to the property did not wholly fail, in consequence of a mutual mistake of all parties upon a matter of fact. For Mrs. McCarthy, in any event, was entitled to a life estate

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in one third of the property; for her dower interest therein. And if the appellant was not willing to run the risk as to the residue of the title, which was supposed to have been acquired under the release from the commissioners of the land office, he should have insisted upon covenants of warranty. Or, rather, he should not have bidden thereon at the sale; as it is fairly to be inferred from the case that the master put up the property and sold it at the risk of the purchaser as to the title. For it is not to be supposed the master would warrant the title to property in which he had no interest; or that Mrs. McCarthy would warrant it, for the purpose of enhancing the amount of the purchase money for the benefit of Mrs. Bant, who was entitled to the half thereof. Her own interest in the proceeds of the sale she could protect, without running that risk as to Mrs. Bant's share, by bidding in the property herself, if it was likely to be sold under what she supposed its real value to a purchaser who assumed the risk of the title; as she was authorized to do so under the order of the vice chancellor who directed the sale.

The objection in the answer that the plaintiff in the ejectment suit should have been made a party to this bill of foreclosure, so that his claim to the property might have been settled and determined in this suit, was wholly untenable. For as he claimed adversely to the complainants, as well as to the mortgagor, and by a title which, if valid, was paramount to both, the validity of his claim could not have been litigated in this suit. And if he had been made a party defendant he might have demurred for want of equity as to him. The defence set up in the answer, therefore, entirely failed, and the decree appealed from must be affirmed, with costs.

## PEABODY vs. FENTON and others.

Where a person obtained the assignment of a bond and mortgage, from the owner thereof, by false pretences, amounting not only to a gross fraud but also to a felony; and transferred the same to a third person for less than their value, and under circumstances calculated to put the latter upon inquiry; *Held* that no title passed to the purchaser, under the assignment to him; and that the owner of the bond and mortgage was entitled to a decree declaring the assignments fraudulent and void, as against him, and directing the purchaser to re-assign the bond and mortgage; and to refund the amount which such purchaser had collected upon the same, with interest.

Where the purchaser of a bond and mortgage, obtained from the owner thereof by fraud and felony—though he has no reason to suspect any fraud in the transaction, so as to be put upon inquiry—pays for such securities less than the amount actually due thereon, if he is entitled to protection as a bona fide purchaser without notice, he will not, in equity, be permitted to retain the bond and mortgage for the full amount due thereon; but only for the amount which he paid for them.

*Andrews v. Dieterich*, (14 *Wend. Rep.* 36,) doubted. *Mowry v. Walsh*, (8 *Cowen*, 238,) and *Parker v. Patrick*, (5 *Term Rep.* 175,) commented upon.

Even in the case of negotiable paper which has been lost by the owner, or which has been obtained from him by fraud, or by larceny, the holder thereof cannot retain it as against the rightful owner, where he received it under circumstances which were calculated to throw a suspicion upon the right of the person from whom he received it, to dispose of it as his own. For purchasing a security under such circumstances is gross negligence.

Thus where persons purchased a bond and mortgage originally given to secure the payment of \$8000, and upon which the sum of \$2000 and the annual interest had been paid; they paying therefor only three-fourths of their actual value, in unsaleable goods at forty per cent above their market price, and out of the usual course of business; *Held* that the fact that the pretended owner of the securities was willing to make such a sacrifice, and for articles which he did not intend to use himself, but which were to be immediately sent to an auctioneer to be sold, was sufficient to put the purchaser upon inquiry as to the ownership of the bond and mortgage.

A party, to be protected as a bona fide purchaser without notice, must have acquired the legal title, as well as an equitable right, to the property.

THIS case came before the chancellor upon appeal, by W. and R. Kelly and Downer and Rogers, four of the defendants, from a decree of the vice chancellor of the eighth circuit. In November, 1837, J. J. McPherson mortgaged to D. McPherson certain lands in Genesee county, to secure the payment of \$8000; for which he also gave his bond, payable in eight yearly

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payments, commencing on the first of April then next, with annual interest. The first payment, with interest on the whole bond and mortgage, was paid in April, 1838; and in May of the same year the mortgagee assigned the bond and mortgage, and the payments thereafter to become due thereon, to the complainant. In March, 1839, the complainant being desirous of raising the money upon the bond and mortgage, applied to the defendant J. J. Fenton, then a broker of Rochester, to buy the same. Fenton, for the purpose of defrauding the complainant, falsely represented to him that he was the agent of John F. Wyckoff of the city of New-York, for the purpose of investing money for him on bonds and mortgages, and that if the complainant would make an assignment of his bond and mortgage to Wyckoff, and leave the same to be forwarded to the latter, the money would be paid as soon as the necessary searches could be made to ascertain the validity of the title and the sufficiency of the security. The complainant accordingly executed an assignment to Wyckoff, and left it with Fenton to be delivered upon the receipt of the money, after the proper searches should have been made. After waiting some time the complainant called upon Fenton for the money, but was put off by him, with various excuses, from time to time, and in the meantime the complainant had received the second payment upon the bond and mortgage, leaving the amount then due, from the mortgagor, \$6000, and interest from the first of April, 1839. Shortly afterwards Fenton made an agreement, in the name of J. F. Wyckoff, who was an infant and with little or no property, and who had never authorized Fenton to act as his agent in the purchase of bonds and mortgages, to sell the complainant's bond and mortgage to the defendants Downer & Rogers; one-fourth thereof to be paid in cash, and the residue in French fancy goods, at specified prices which were much beyond the real value of the goods. And Wyckoff, who was ignorant of the fraud which Fenton had practised upon the complainant, in his name, and supposing that Fenton had taken the assignment in his name for some honest purpose, consented to execute an assignment of such bond and mortgage upon the sale

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which Fenton had made to Downer & Rogers. But as Downer & Rogers were indebted to the defendants W. & R. Kelly, it was arranged that the assignment should be made directly to them. Wyckoff accordingly executed an assignment of the bond and mortgage to W. & R. Kelly, on the 7th of June, 1839; and Fenton received the money and goods from Downer & Rogers, according to the agreement. He sent the goods to an auctioneer to be sold, and received an advance thereon to their full value.

The complainant being ignorant of the fraud that had been practised upon him, and of the sale of the bond and mortgage, again applied to Fenton for the money, on the 5th of July, 1839. At that time Fenton, in connection with some other persons, had organized a fraudulent association under the general banking law, called The Farmers' Bank of Seneca County. And when the complainant applied for his money, Fenton again put him off with some excuse; but remarked that the complainant might have heard unfavorable reports of him, but that he was willing to give him security until the money could be procured from Wyckoff for the bond and mortgage. He accordingly filled up and delivered to him for that purpose a certificate for 600 shares of \$100 each, in The Farmers' Bank of Seneca County, which subsequently turned out to be worthless. And he shortly afterwards gave to him two or three drafts and certificates of deposit of the same banking association, which also were worthless, and were never paid. In April, 1840, the complainant heard, for the first time, of the assignment of the bond and mortgage to W. & R. Kelly, and that their attorney had received from the mortgagor \$1320 of the payment of principal and interest which became due upon the first of that month. He thereupon filed his bill in this cause, against the assignees and against Fenton and J. F. Wyckoff, and also against The Farmers' Bank of Seneca County, and John Wyckoff, who was the president thereof. He afterwards ascertained that Downer & Rogers had procured the assignment of the bond and mortgage to the Kellys, under the purchase made by the former from Fenton through the medium of a

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broker employed by him to negotiate the sale thereof; and he thereupon amended his bill, by stating that fact and making Downer & Rogers also defendants in the suit. The cause was heard before the vice chancellor upon pleadings and proofs as to W. & R. Kelly and Downer & Rogers, and upon the bill taken as confessed as to the other defendants. He decided and decreed that the assignment from the complainant to J. F. Wyckoff, and the assignment of the latter to the Kellys, were fraudulent and void as against the complainant. The decree also directed W. & R. Kelly to reassign the bond and mortgage to the complainant, and to refund to him the amount they had collected upon the bond and mortgage, with the interest thereon; that the complainant should transfer to them his interest in the certificate of stock, and in the drafts and certificates of deposit of the Farmers' Bank of Seneca County, given to him by Fenton.

*G. H. Mumford*, for the appellants. The defence rests substantially upon two points. 1. A question of fact, whether we have made out that the defendants are bona fide purchasers without notice; and 2. A question of law, whether as bona fide purchasers the defendants' equity is superior to the complainant's. We suppose that the Kellys stand precisely in the situation of Downer & Rogers, and that if the latter were bona fide purchasers, the former must occupy the same position. Were Downer & Rogers, then, bona fide purchasers? The answers of the defendants fully deny all notice or suspicion of the fraud charged in the bill; but their answer on oath having been waived, this furnishes no testimony. It however puts the fact of their want of notice distinctly in issue, and throws the burden of proof upon the complainant. (2 *Edw. Rep.* 259. *Hop. Rep.* 48. 8 *Cowen*, 361.) The complainant has introduced no direct testimony on this subject, showing notice to the defendants; but the fact of such notice is disproved, so far as such a fact can be disproved. *John F. Wyckoff*, a witness for the complainant, testifies that he does not know the Kellys, and that he had no acquaintance with Downer & Rogers previous



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to negotiating this bond and mortgage. He had no conversation with Downer & Rogers about this sale, previous to the assignment, and never heard any thing from them indicating a knowledge of the purposes for which Fenton held the bond and mortgage. *Nathaniel S. Jacob*, a witness for the complainant, went to Downer & Rogers' store to look at the goods, for which the bond and mortgage were in part sold. Saw Downer, but had no conversation with him, nor did Fenton or Wyckoff at that time. *Henry P. Hoyt*, a witness for the defendants, was employed by Fenton and Wyckoff to negotiate the bond and mortgage. Witness was but slightly acquainted with Downer & Rogers, having had but one previous transaction with them. He took Fenton and Wyckoff to Downer & Rogers and introduced them. They were previously strangers.

There is then no direct testimony to throw a shade of suspicion over the denial of the defendants in their answer, of all notice of fraud. When there exists only a suspicion of notice, equity will not act upon it. (*Eyre v. Dolphin*, 2 Ball & Beat. 290.) The only possible ground upon which the complainant's counsel can urge a constructive notice to the defendants arises from the fact that the goods which formed part of the consideration for the bond and mortgage, were sold by Downer & Rogers at prices much higher than the goods were then worth. Downer & Rogers were merchants, had failed, and were left with a stock of goods on hand, which they were anxious to dispose of and close up their concern. Their object was not to invest money, but to sell their goods at a fair price and pay their creditors. The only object they could have had in advancing money was to get a good price for their goods. At this time it was difficult to negotiate country mortgages for cash upon any terms. This was undoubtedly known to them. Securities the most unimpeachable, if disposed of at all in market, must be sold at a sacrifice; and while transactions of this kind were going on around them daily, it could arouse no suspicion that in this case the holders of a bond and mortgage, having six years to run, should desire to realize the avails at a discount. That the goods were worth less than Wyckoff allowed for them

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may be admitted ; but the proof to show that the difference was so great as to attract particular notice or attention is far from satisfactory. *Jacobs*, it is true, estimates the goods as being worth 40 per cent less than invoice prices. This, taking the money into consideration, would be an average discount on the whole amount of about 30 per cent ; a large discount, certainly, but hardly sufficient to carry home to a purchaser any reasonable presumption that the vendor's title was defective. But *Jacobs* is the confidential agent and friend of *Fenton & Wyckoff*. He examined the goods and saw the invoice. He told *Fenton* that he did not think the goods worth the prices charged, but he did not then inform him what deduction should be made, and his notions are very likely to be colored by the subsequent auction sale. Again, the goods were fancy summer goods, and subject to great depreciation, more so than other kinds of goods ; and during the years 1839 and 1840, when in auctioneer's hands, depreciated 40 or 50 per cent. More than one quarter of the goods was millinery, which depreciates more than any other goods in market, and is rarely sold at auction. This portion of the goods was charged in invoice at 95 cts. per yard, and *Downer* sold a similar case at \$1,25 to \$1,38. The auctioneer estimated the goods at auction prices, at \$3000 ; still presuming they might bring far beyond that sum. He wished to be on the safe side. The auction prices are no fair test of the fair value of goods, particularly summer fancy goods, and put upon the market, as a large portion of these were, out of season and when there was no demand for them. But the conduct of *Downer & Rogers* negatives the idea that they had any suspicion in point of fact of any difficulty in reference to the title of *Wyckoff*. Certificates as to title and value were produced with the assignment, but *Downer & Rogers* would not close the matter in this way. They required and obtained the admission of the mortgagor that all was right, and delayed closing the transaction until this was done. Several weeks passed away in the investigation of the matter, and it was not until all was done that prudent men would do, that *Downer & Rogers* delivered the goods and completed the bargain. Assuming that the terms of sale were not

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of a character to stamp the title of Wyckoff with marks of suspicion, in the estimation of men of ordinary prudence, it cannot be objected here that a full consideration was not paid. If the mortgage was valid in Wyckoff's hands, he had a right to sell, and Downer & Rogers to buy, at any price they could agree upon. No authority is needed for this position.

As bona fide purchasers the defendants acquired a perfect title, subject only to the equities of the mortgagor, if any. The doctrine that a bona fide purchaser of chattels, from a fraudulent vendor, acquires a good title as against the original owner, seems to be well settled in this country and in England. So with respect to negotiable notes, money, checks, &c. even when the owner has not voluntarily parted with title or possession. (12 *John.* 348. 8 *Cowen*, 238. 13 *Wend.* 570. 20 *Idem*, 267. 22 *Idem*, 318. 1 *Hill*, 302.) The purchaser of a bond and mortgage stands upon a little different footing. It would seem that a bona fide purchaser of such a security would obtain a perfect title as against all the world except the original obligor or mortgagor ; but as to them he takes subject to their equities. The reason is, that the assignee or purchaser can go to the debtor and ascertain the facts, but he is not obliged to, nor can he ascertain what claim others may have. (2 *John. Ch.* 441, and cases there cited. 1 *Munf.* 533. 2 *John. Ch.* 479. *Livingston v. Dean*, 1 *Id.* 566, 581. *Murray v. Ballou*, *Idem*, 213.) The same ground is taken by Woodworth and Sutherland, justices, in the court of errors, in the case of *James v. Morey*, (2 *Cowen*, 288, 297.) In *Van Rensselaer v. Stafford*, (*Hopk.* 575,) Stafford received his assignment to secure a precedent debt.

But it is said, by the vice chancellor, that although the defendants, as bona fide purchasers from a fraudulent vendee, might be permitted to hold the securities, yet inasmuch as their title is derived through a felony, the plaintiff must prevail. The argument is this: The securities were obtained by Fenton by false pretences. This offence may be punished by imprisonment in the state prison. (2 *R. S.* 677, § 53.) Felony is an offence so punishable ; (2 *Id.* 702, § 30 ; ) consequently this is a felony, and the common law rule applies that no title can be

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acquired through a felony. (*Andrews v. Dieterich*, 14 *Wend.* 31.) It is not pretended that the obtaining of goods or property upon false pretences is a felony at common law. (*Morey v. Walsh*, 8 *Cowen*, 238.) The statute, it is said, works the change. If it did, it could only have been by a technical and forced construction, that the consequences claimed would have flowed from it; and the argument may be met by one equally literal and technical. We say then that the statute does not in terms declare this a felony. The statute (2 *R. S.* 677, § 53) subjects the offender to imprisonment in a state prison, but does not declare the offence a felony. And it (2 *R. S.* 702, § 30) defines the meaning of the word *felony* only when used *in that act or any other statute*. It leaves then all offences, except such as are declared by statute to be felonies, as they were at common law, and this amongst others. But there is another rule that comes to our aid here. An offence shall never be made felony by construction of doubtful or ambiguous words of a statute. (*Barb. Cr. Law*, 18.) Therefore, if it be prohibited under *pain of forfeiting all that a man has*, (a forfeiture of lands and goods being the criterion of a felony at common law,) or of forfeiting body and goods, &c. it shall not amount to a felony. All penal statutes must be strictly construed.

Admitting, however, that the legislature by fair interpretation intended to baptize this offence a felony; there is no reason to believe that they contemplated, by that act, any change in the civil rights of the citizen, not cognizant of or tainted with the offence. It is obvious from the revisers' notes on the section of the revised statutes referred to, (3 *R. S.* 836, § 30,) that no such idea entered into their minds; but that the object was simply to give a definite meaning to a word used in the statutes, and which without this section had become vague and indefinite. It would be highly improbable, therefore, that the legislature should have intended to go beyond the letter of the law, and have changed the law by implication and inference. And without the very respectable opinion of C. J. Savage, in *Andrews v. Dieterich*, (14 *Wend.* 31,) would seem to require but little argument. It has been held repeatedly by the supreme

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court, that when the law is settled, a change in the phraseology of the statutes shall not work a change in the law, unless the intention to work such change clearly appears. (2 *Cain. Cas. Er.* 143, 151. 4 *John.* 317, 359. 21 *Wend.* 316, 319. 2 *Hill*, 380.) Here an entire revolution in civil rights is to be effected, by a change in the statute, which would not probably have been suggested to the mind of a single member of either house of the legislature, had the whole 160 members been lawyers. Here a penalty is sought to be imposed upon the defendants, which cannot be done by implication. (*Jones v. Estis*, 2 *T. R.* 379. *Myers v. Foster*, 6 *Conn. Rep.* 567.) Chief Justice Savage, in *Andrews v. Dieterich*, seems to think there is no reason for the distinction between a felony and a fraud, in this respect. But it seems to us that the distinction is obvious and supported by sound reasoning. A party losing his property without his consent, is in no way answerable for the fraud committed upon a bona fide purchaser. If he parts with his property voluntarily, although deceived, he has by his own imprudence enabled the fraudulent vendee to cheat the subsequent purchaser, and should therefore sustain the loss. (2 *Paige*, 169, 172.)

In this case there were acts, on the part of the complainant, previous to the transfer to the defendants, calculated to give currency to the securities, and to induce purchasers to buy, which should preclude him from contesting the rights of a bona fide purchaser, and which would cut off the rights even of the original debtor. I allude now not only to his delivering possession of the bond, mortgage and assignments, but also furnishing Fenton with searches, evidence of title, certificates of value, affidavits as to incumbrances, &c. ; in short, arming him with all the implements to show a perfect title in himself, and to deceive and defraud others. In the case of *Kemp's Ex'rs v. McPherson*, (7 *Har. & John.* 320,) a purchaser of land subject to legacies, who gave his bonds for the purchase money, which were assigned and judgments recovered thereon, was denied relief; on the ground that he knew of the charge when he gave the bonds, and ushered them into the world without any intimation on their face that they were subject to charge. So also

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at law, a party shall be concluded by admissions, or conduct, upon which others have been induced to act, where, if he were permitted to prove such admissions or conduct false, it would operate as an injury to the persons misled by them. (1 *Cowen & Hill's Notes to Phil. Ev.* 199.)

Again; the complainant, by his own acts, after the transfer of the bond and mortgage to the defendants, relinquished any claim he might have otherwise had thereto, and ratified the sale to them. In order to charge the complainant with having ratified the sale to the defendants, it must appear that he had actual or constructive notice of it. We suppose this appears with sufficient certainty. The assignment of the bond and mortgage from Wyckoff to the Kellys was dated June 7, 1839, and was recorded in Genesee county July 29, 1839, and in Monroe county October 7, 1839. We claim that the record is notice to Peabody, the statute only excepting the case of the mortgagor making payment to the mortgagee without notice. (1 *R. S.* 756.) The facts disclosed in the bill and proofs are abundantly sufficient to put the complainant on inquiry; and this, in equity, is equivalent to actual notice. 1 *Paige*, 461. 4 *Cowen*, 717. 7 *Conn. Rep.* 324.) The following were acts of ratification: On the 5th of July, 1839, the complainant accepted and received from Fenton a certificate of sixty shares of stock in the Farmers' Bank, as security for his money. On the 28th of August he went to Romulus to obtain money; saw Fenton and demanded, not his bond and mortgage, but his money. On that occasion Fenton proposed to give him a draft for \$1500; he took the draft, which was at sixty days and without previous acceptance. On the 23d of October the complainant again applied to Fenton for his money. Fenton made various excuses, and offered him a draft and certificate of deposit for \$440, payable in four months, and a draft on New-York for \$1169,20 at sixty days. On the 30th of December, in the same year, he again went to see Fenton at Romulus, and informed him that the drafts had been protested. He makes no demand of his bond and mortgage, but is attempting to secure something on account of it. Fenton promises him the money in

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twenty days. The complainant subsequently made several journeys to Romulus to obtain his money, but was delayed under various pretences until April, 1840. The complainant presented his drafts and certificate of deposit, which became due from October to February, and took all legal measures to charge the parties. If the complainant is chargeable with notice, then slight proof of acquiescence on his part will be sufficient to conclude him. (*Story on Agency*, 247, *et seq.* 2 *Salk.* 442. *Smith v. Calsgan*, 2 *T. R.* 188, *note.* *Cornwall v. Wilson*, 1 *Ves.* 509. *Codwise v. Hacker*, 1 *Caines*, 526. *Towle v. Stevenson*, 1 *John. Cas.* 110. *Armstrong v. Gilchrist*, 2 *Id.* 424. 12 *John. Rep.* 300. 2 *Mass. Rep.* 106. 13 *Id.* 361.) In *Trowbridge v. Beach*, in the supreme court (not reported) the defendant's acceptance had been fraudulently put in circulation by Hudson. The defendants learning the fact, applied to Hudson for security and obtained partial security. They were held to be concluded, in the action upon the bill, brought by the plaintiff, who had received it from Hudson and without paying value at the time.

*M. F. Delano*, for the respondents. The assignment of the bond and mortgage executed by the complainant to John F. Wyckoff, was procured by the false pretences of Fenton. And the title of Downer & Rogers to the Kellys, being acquired by the commission of a felony, was null and void, even if the persons last named had acquired the securities in good faith and for a full consideration. The delivery of the assignment of the bond and mortgage by the complainant was not absolute, but for a special purpose; and that delivery being procured by representations, which if not felonious were grossly fraudulent, the holders of such securities are not entitled to retain them as against the complainant, although they may be bona fide purchasers, without notice. But neither the Kellys nor Downer & Rogers are bona fide purchasers for a full consideration, and without notice, express or implied, of the rights of the complainants. 1st. Because they derive their title, upon the face of the assignment, from the complainant, through Wyckoff, and are

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to be charged with all the defects of that title ; 2d. Because they did not purchase in the usual course of trade and for a full consideration ; and 3d. Because the circumstances under which the securities were obtained were such as to induce a prudent man to suspect an adverse claim. The decree of the vice chancellor should therefore be affirmed with costs.

THE CHANCELLOR. There can be no doubt, from the evidence in this case, that Fenton obtained the assignment of the bond and mortgage, from the complainant, by false pretences ; amounting not only to a gross fraud but also to a felony, under the provisions of the revised statutes. And the complainant did no act to ratify that transaction after he was aware of the fraud. It also appears from the testimony that Downer & Rogers, even if they had no reason to suspect some unfairness in the transaction, so as to make it their duty to inquire of the assignor whether Wyckoff was the real owner of the bond and mortgage, paid in money and property, at the extent, thirty per cent less than the amount actually due upon the bond and mortgage. If they were entitled to protection, therefore, as bona fide holders and purchasers without notice, they, or those to whom they procured the transfer to be made in payment or security for an antecedent debt, could not in equity be permitted to retain the bond and mortgage for the full amount due thereon ; but only to the extent of the value of the property, &c. which was paid for the same.

The vice chancellor has placed his decision solely upon the ground that the obtaining of the assignment from the complainant, with intent to defraud him, is a felony by the revised statutes. In the case of *Mowry v. Walsh*, (*5 Cowen's Rep.* 238,) which was decided before the adoption of the revised statutes, the supreme court held, in conformity with my decision at the circuit, that where the purchase of goods was obtained by false pretences, and by means of a forged recommendation of the character and responsibility of the purchaser, but not feloniously, a subsequent bona fide purchaser of the goods, from the fraudulent vendee, for a full consideration, and without notice



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of the fraud, was entitled to hold such goods as against the original owner. That decision was based upon the principle that where one of two innocent persons must necessarily suffer by the wrongful act of a third person, the loss should fall upon the one of them who by his own voluntary act or negligence has enabled the wrongdoer to produce the injury. At the time that decision was made, the obtaining of money or goods by false pretences, with intention to defraud the owner, was a criminal offence punishable with imprisonment in the state prison, or in the county gaol, in the discretion of the court. But it was not a felony at the common law; nor had it then been made a felony by statute. A similar decision was made by the court of king's bench in England, in the case of *Parker v. Patrick*, (5 Term Rep. 175;) where the obtaining of money or goods by false pretences was punishable by transportation, or by fine or imprisonment, in the discretion of the court. But the revised statutes having declared all offences which render the offenders liable to imprisonment in the state prison to be felonies, the supreme court subsequently held that the power of the fraudulent vendee to transfer a valid title to the property, to a bona fide purchaser without notice of the fraud, no longer existed. (*Andrews v. Dieterich*, 14 Wend. Rep. 36.) I am inclined to doubt whether this is a correct view of the operation of this provision of the revised statutes. For I apprehend that the principle upon which the decisions in *Mowry v. Walsh* and *Parker v. Patrick* were sustainable, was not the mere fact that the offence which the first vendee of the property had perpetrated, in obtaining it, was not technically a felony; but that the possession of the property, and the apparent ownership thereof, by such vendee, was the voluntary act of the original vendor, and that the latter had not lost the possession by theft or robbery. Without expressing any definite opinion upon this question, however, I think the decree appealed from is sustainable upon other grounds.

Even in the case of negotiable paper which has been lost by the owner, or which has been obtained from him by fraud or by larceny, the holder thereof cannot retain it, as against the rightful owner, where he received it under circumstances which were

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calculated to throw a suspicion upon the right of the person from whom he received it to dispose of it as his own. Purchasing a security under such circumstances is gross negligence. Here Downer & Rogers purchased a bond and mortgage which from the inquiries made by them, they must have known to be perfectly well secured; and upon which it appeared by the endorsements that \$2000, and the annual interest, had been paid as the payments became due; they paying three-fourths of the actual value of these securities in unsaleable goods, at forty per cent above their market value, and out of the usual course of business. The fact that the pretended owner of these securities was willing to make such a sacrifice, and for articles which he did not intend or wish to use himself, but which were immediately to be sent to an auctioneer to be sold, was sufficient to satisfy any reasonable man that the vendor was probably selling what was not his own. Downer & Rogers ought not, therefore, to have made the purchase without inquiring from the original assignor whether Wyckoff was in fact the real and bona fide owner of these securities. Their negligence in not making some inquiry on that subject was at least equal to, if not greater than, the negligence of the complainant in intrusting an assignment of the bond and mortgage to Fenton, as an escrow, to be delivered to Wyckoff the supposed purchaser, when the money should be paid by him. The principle upon which the decision in the case of *Mowry v. Walsh* was based, therefore, was inapplicable to the circumstances of this case.

Again; to protect a party as a bona fide purchaser without notice, he must have acquired the legal title as well as an equitable right to the property. That was the case in *Mowry v. Walsh* and in *Parker v. Patrick*. For in each of those cases the original owner of the property had made an absolute sale thereof, which sale had been consummated by an absolute delivery to the purchaser. And the sale, although voidable by the vendor, at his election, on account of the fraud, was still valid until rescinded by him. It was therefore like the case of a conveyance of land obtained by fraud, which is also voidable at the election of the grantor; and where the fraudulent grantee has the

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power to transfer a valid title to a bona fide purchaser without notice of the fraud. But if such bona fide purchaser has not obtained the legal title, by an actual and valid conveyance, he cannot protect himself against the prior equity of the original owner to rescind the conveyance to the fraudulent grantee; although such bona fide purchaser has a contract for a conveyance, and has actually paid for the land. (*Wigge v. Wigge*, 1 *Atk. Rep.* 384; 1 *West's Rep.* 680, *S. C.* *More v. Mayhew*, *Freem. Ch. Rep.* 175. *Tourville v. Nash*, 3 *Peer Wms.* 307.)

In the case under consideration there never was an absolute and unconditional delivery of the assignment to Fenton, as the professed agent of Wyckoff. But it was put into his hands to be delivered upon the actual payment of the purchase money. Wyckoff, therefore, never was the legal assignee of the bond and mortgage, so as to have a valid title at the election of the complainant. And as Wyckoff was an infant, and never authorized Fenton to act as his agent, there was no agreement on his part to become the purchaser of the bond and mortgage. As an infant, he was also incapable of transferring a valid title to the bond and mortgage to his assignees; especially as he never in fact obtained any part of the consideration which Fenton received upon the sale to Downer & Rogers. Even if the legal title to a mere chose in action was capable of being transferred by assignment, therefore, these supposed transfers were insufficient for that purpose.

The legal title as well as the prior equitable right to this bond and mortgage being in the complainant, he was entitled to the relief granted by the vice chancellor. The decree appealed from must therefore be affirmed, with costs.

**CROMER vs. PINCKNEY and others, executors, &c.**

**As** a general rule, a legatee may sue the executor, for his own particular legacy, without making the residuary legatees, or any other legatees, parties to the suit. *Aliter* where one of the residuary legatees sues for his share of the residue; an account of the estate being necessary, in that case.

**Where** a suit is brought for the recovery of a particular legacy, which suit, if successful, will reduce the fund bequeathed to the residuary legatee, the interest of the latter will be protected by representation; the executors representing the residuary estate and those interested therein, for the purpose of protecting it against all prior claims upon it which might diminish its amount.

**The** declarations of a testator, made after the execution of his will, cannot be received as evidence of what he intended by the terms nephews and nieces.

**How** far the situation of the testator's family relatives may be taken into consideration for the purpose of giving a construction to the doubtful clauses in his will.

**As** a general rule in the construction of wills, the testator must be presumed to have used words in their ordinary or primary sense and meaning; unless from the context of the will it appears that he intended to use them in some other or secondary meaning; or where, by reference to extrinsic circumstances, which existed at the time of making the will, or which must necessarily exist in the event or at the time contemplated by him, the use of such words in their ordinary or primary sense would render the provision of the will in reference to which such words were used insensible, absurd, or inoperative.

**Thus** the word children, in its primary and ordinary sense, means the immediate legitimate descendants of the person named. And where there is nothing to show that the testator intended to use it in a different sense, it will not be held to include illegitimate offspring, step-children, children by marriage only, grand-children, or more remote descendants.

**The** words nephews and nieces, likewise, in their primary and ordinary sense, mean the immediate descendants of the brothers and sisters of the person named, and do not include grand-nephews and grand-nieces, or more remote descendants.

**But** where the testator by one clause of his will gave a legacy unto each of his nephews and nieces except J. C. who was not a nephew but one of the children of a deceased nephew; and by another clause he gave to the children of his nephew J. C. \$500; *Held* that the brothers and sisters of J. C. and other grand-nephews and nieces whose ancestors were dead at the time of making the will, were entitled to legacies; the will showing that the testator used the words nephews and nieces in an enlarged sense, so as to include all the grand-nephews and nieces whose parents were dead.

*Held* also, that upon the ordinary rules of construction, parents and children could not both take, under the description of the testator's nephews and nieces, but only the parents who were living, and those grand-nephews and nieces whose parent was dead.

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THIS was an appeal from a decree of the vice chancellor of the first circuit, settling the construction of the fourth clause of the will of Peter Marks deceased, and authorizing the defendants, as executors of the decedent, to pay to the complainant and others their several legacies of \$500 each, in conformity to that construction.

Peter Marks, the testator, died in March, 1845, leaving real estate, and personal property of the value of about \$23,000 over and above his debts. He died without issue; and his collateral relatives at the time of his death were as follows: John Marks his brother, Catharine Emerson a niece who had three children at that time, G. W. Marks a nephew; Nicholas Cromer, John Cromer, Anthony Cromer, and Mary Carpenter, who were the grand-children of the testator's deceased sister Elizabeth, by her oldest son Nicholas Cromer who was then dead; and Valentine Killerman, John Killerman, and Mary Elizabeth Killerman, who were also grand-children of the testator's sister Elizabeth, by her deceased son Valentine Killerman. The testator also left a great grand-niece, Mary Elizabeth Ferris, who was the only child of a deceased daughter of his deceased nephew Nicholas Cromer, the father of the complainant. The testator also had a sister Catharine, who, many years previous to his death, moved to the west; and who when last heard from was in Canada. But whether she was living at the time of the death of the testator, or how many children she then had, the parties to this suit had not ascertained.

By the will of the testator, which he executed but a few days before his death, he gave certain pecuniary legacies to persons who were not his relatives, and made some dispositions of parts of his property which it is not necessary here to mention. And he gave the use or income of his real estate, for life, to his brother John, who was then under the care of a committee; and directed that the same should be sold, after his brother's death, and that the proceeds thereof should be divided among all the heirs and next of kin of the testator. He also made a similar disposition of his residuary personal estate. The third, fourth, and tenth clauses of his will were as follows:

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‘*Item third.* I will and bequeath unto the children of my sister Catherine each five hundred dollars. *Item fourth.* I will and bequeath unto each of my *nephews and nieces*, five hundred dollars; excepting *John Cromer*. *Item tenth.* I will and bequeath unto the children of my *nephew John Cromer*, five hundred dollars.’

The complainant claimed that under the fourth clause of the will he, as a grand-nephew of the testator, was entitled to a legacy of \$500; and that the testator intended to include him and his brother and sister, under the terms nephews and nieces. The bill stated that the testator, after the making of his will, in speaking of its provisions to the wife of one of his executors, said that he had left the Cromers \$500 each. This fact was admitted by the answer of the defendants; but they insisted it was not admissible as evidence to change the legal construction of the will. It was also charged in the bill, and admitted in the answer, that the complainant and his brother Nicholas had at different times resided with the testator, and had always been treated by him as near relatives.

The cause was heard before the vice chancellor upon bill and answer. He decided and declared, by his decree, that G. W. Marks and Catharine Emerson, the nephew and niece of the testator, who were living at the time of the death of the testator, and all the grand-nephews and nieces of the testator the descendants of the testator's sister Elizabeth, and also his great grand-niece, all of whose ancestors, of the testator's blood, were dead at the time of making the will and at his death, were entitled to legacies of \$500, according to the true meaning and construction of the fourth clause of the will; except John Cromer one of those grand-nephews, who was in terms excluded. And he decided and declared that the grand-nephews and nieces, who were the children of his niece Catharine Emerson, who was herself alive and entitled to a legacy under that clause of the will, were not entitled to legacies. The decree therefore authorized the defendants to pay those legacies, according to that construction of the will; and directed the costs of both parties in the suit to be paid out of the residu-

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any personal estate in the hands of the executors. From this decree the defendants appealed to the chancellor.

*Geo. Wood*, for the appellants. The vice chancellor erred in making any decree in the cause; the proper parties not being before the court. (*Russell v. Clark's Ex'rs*, 7 *Cranch*, 72. *Colt v. Lasnier*, 9 *Cowen*, 320.) John Marks, and in fact all persons who were legatees, or might be so considered under the will, ought to have been made parties. The respondent is not entitled to the legacy of \$500, claimed under the fourth clause of the will of the testator Peter Marks. Because (1.) He is not a nephew of the testator. (2.) Because there are persons *in esse* answering the description in the will; and the court cannot construe the same so as to let in any persons not within the terms. (*Fowler v. Kemp*, 5 *Har. & John*, 135. *Gardner v. Hyer*, 2 *Paige*, 11. *Reeves v. Brymer*, 4 *Ves.* 698; 1 *Ves. sen.* 196. *Shelly v. Bryer*, 1 *Jac.* 207. *Doughty v. Cutter*, 23 *Wend.* 513. *Cutter v. Doughty*, 7 *Hill*, 305.) (3.) Because such a construction would let in great nephews and nieces to take equally with their parents, viz. Mrs. Emerson and her children, &c. (*Radcliff v. Buckley*, 10 *Ves.* 195. *Cutter v. Doughty*, 7 *Hill*, 305.) The parol declaration of the testator to Mrs. Bowers is not admissible as evidence in the cause. Because (1.) It goes to contradict the will, and cannot be received for that purpose. (*Mann v. Mann's Ex'rs*, 1 *John. Ch. Rep.* 231 and cases cited.) (2.) Because it is not shown to have been made contemporaneously with the drawing of the will. (*Nourse v. Finch*, 1 *Ves. jun.* 359. *Duke of Rutland v. Duchess of Rutland*, 2 *Peer Wms.* 158.) (3.) Because it is alleged to have been made after the will was executed. (1 *Mad. Rep.* 438.) (4.) But if admitted as evidence in the cause it does not help the respondent's case. Because a part of such declaration is shown to be untrue by the will itself, viz. in regard to the testator not having given any thing to his niece Mrs. Emerson. (*Strode v. Russell*, 2 *Vern.* 625. *Trimmer v. Byrne*, 7 *Ves.* 519. *Roberts on Wills*, *Lond. ed.* of 1809, pp. 454, 455; *ed. of 1815*, vol. 2, p. 46; *ed. of 1826*, pp. 586 to 588.) The decree

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of the vice chancellor ought to be reversed, and the bill dismissed with costs; or at all events the decree should be so modified as not to let in any of the great nephews or nieces, but the Cromers by name.

*A. Thompson*, for the respondent. The decree from which the appeal is taken gives the true construction to the fourth clause of the will. The construction is according to the intent of the testator. (10 *Ves.* 195. 3 *Ves.* & *Beames*, 69.) The third clause of the will provides for the children of the testator's sister Catharine; and it is repugnant to law, that they should also take under the fourth clause by the name of nephews and nieces, and thereby take double legacies. The fourth clause provides for nephews and nieces, (of which he had only a nephew and niece, Catharine's children, if any, being provided for,) unless grand nephews and nieces came in, of whom John Cromer was one. The tenth clause again names John Cromer as a nephew, and gives the legacy taken from him in the fourth clause, to his children. The testator, on the face of the will declared that John Cromer was a nephew; and his children take under that clause, as children of a nephew. The complainant and his brothers and sisters lived in the testator's family, and he always treated them as near relatives. (3 *Coven & Hill's Notes*, 1374. 1 *Edw. Ch. Rep.* 189.) The fourth and tenth clauses show that the testator, by excluding John Cromer, and giving his children \$500, a nephew's portion, did not intend that parents and children should both take under the designation of nephews and nieces; and therefore the decree properly excludes the children of Catharine Emerson, the testator's niece, from a legacy under the fourth clause. The fourth and tenth clauses also show that the testator intended that Elizabeth Ferris, the infant daughter of Catharine Ferris, deceased, who was the sister of John Cromer and the complainant, should receive a legacy of \$500, under the designation of niece; it appearing to be the intention of the testator to give something to all his relatives. (23 *Wend.* 522. *Ambler*, 555.) The decree is also well supported by decisions. The word



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children does not include grandchildren, unless the word is used as synonymous with issue or descendants, or unless the word must of necessity be extended to prevent the will's failing of effect. (1 *Edw. Ch. Rep.* 354. 7 *Paige*, 328. 1 *Edw.* 41. 8 *Paige*, 375. 23 *Wend.* 513. 10 *Ves.* 195. 3 *Ves. & Beames*, 69.) But we find another class of cases where on the face of the will the words child, grandchild, nephew or niece, show a clear intention of including persons more remote; and then the words take an artificial meaning. (23 *Wend.* 522.) Such cases generally begin and end with the particular clause, where the word is used. Such is this case. The words nephews and nieces are used only in the fourth clause of the will, and the word nephew only in the tenth clause of the will, and in both of which John Cromer, the brother of the petitioner, is clearly named a nephew. The children of Catharine, the testator's sister, having been provided for in the third clause of the will, nephews and nieces could not be found, unless grand nephews and nieces should be included. (23 *Wend.* 522.)

Again; the testator cannot be considered ignorant of the class from which he excluded John Cromer in the fourth clause; nor can it be inferred that he intended, by the tenth clause, to provide for John Cromer's children only; and cut off his grand-nephews and nieces, and the infant, Elizabeth Ferris. There is another class of cases, similar to the present, in accordance with which the decree appealed from was made, and which are decisive of this appeal. In *Hussey v. Dillon*, (*Amb.* 603,) various bequests were made to grandchildren and great-grandchildren; the residue was bequeathed to grandchildren. There the calling a great-grandchild a grandchild, was deemed conclusive, and let in the whole class of great-grandchildren. In *Shelly v. Bryer*, (1 *Jacob*, 207,) the testator gave the residue of his estate, after the death of his sister, &c. to his nephews and nieces then living. Subsequently, by a codicil, he gave to his infant niece, (who in reality was a grand-niece,) Harriet Shelly, £500, at one year after his decease, over and above her share after the decease of his sister, in the body of his will treated of more at large. Harriet Shelly commenced her suit

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for the £500. Under the decree in the cause, the master had taken the accounts of the testator's estate, and had made the necessary inquiries as to the state of his family; and the cause came on for further directions. The counsel for Harriet Shelly contended that the fund was divisible between the testator's nephews and Harriet Shelly, she being specifically named in the codicil as one of the persons to take. The counsel for the great-nephews and nieces contended that they were entitled to share equally with the nephews, on the authority of *Hussey v. Dillon*. The master of the rolls observed that it was a difficult case; that though the codicil must be taken with the will, yet it was not actually the same as if it formed part of it; and that he considered that the testator was writing from recollection of his will, and had mis-recollected it; but that the difficulty was that if the words were to be extended to Harriet Shelly, the same must be done as to the other great nephews and nieces, and both classes, including parents and children, must take together under the same denomination; and therefore he excluded her and the grand-nephews and nieces from sharing the residue equally with the nephews and nieces. The principle of this case is the same as held in 1 *Edwards*, 41; 8 *Paige*, 375, and 23 *Wend.* 522, that though persons may take under an artificial description under some clauses of a will, yet such fact will not necessarily enlarge the signification of other parts of the will. All these cases sanction the authority of *Hussey v. Dillon*, and show that the term nephew and niece being used with the intention of including persons more remote, take an artificial meaning: and are held to mean—when a construction of the particular clause where the word is used is sought, (as in this case)—to include such more remote persons. Thus “children” have been held to include grandchildren; and even great-grandchildren; and have even been extended to the remotest of the living descendants. (4 *Vesey*, 437. *Ambler*, 555, 681. 23 *Wend.* 522.) *Shelly v. Bryer* did not follow *Hussey v. Dillon*, though it sanctioned it, because the word upon which the construction of the will was sought to be extended was in the codicil only; conceding that if the expression had been in

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the body of the will, all the great nephews and nieces would have come in. But in our case the words nephews and nieces except John Cromer, are in the very section to be passed upon. Upon authority there cannot be a doubt that the decree is right as to all therein stated to be entitled to a legacy.

The decree in favor of Elizabeth Ferris, the infant daughter of Catharine Ferris, late wife of Jacob Ferris, is also well supported by authority. Elizabeth's mother was the sister of John Cromer and Anthony Cromer the complainant. The testator evidently intended, under the fourth clause of his will, to provide for all his collateral relatives, except John Marks and the descendants of his sister Catharine. The disposition of the residuum of the real estate, by the second clause of the will, and of the residuum of the personalty, by the eleventh clause of the will, show that he intended all his relatives should be provided for, and therefore the infant Elizabeth should be included by force of 1 *Ves. sen.* 196; *Ambler*, 555, and 2 *Bro. C. C.* 125. Surely this court, which should protect this infant and half orphan, and whose father is too poor to pay for looking after her interest, will not be astute to leave her the only relative who receives nothing under the testator's will. The complainant did not, by his bill, claim this legacy for said Elizabeth Ferris. The vice chancellor has named her as entitled to a legacy of \$500. The appeal is from the whole decree, and Elizabeth Ferris' legacy is not the subject of a specific appeal. The complainant's counsel has felt himself bound to attempt to preserve it to her; and there appears to be no good reason to reverse the decree on her account. The executors were the only necessary defendants, the fund being ample; and John Marks being a lunatic and then without a committee, need not to have been a party in any case. The defendants also demurred to this bill for want of parties, which was overruled October 16, 1845, and no appeal has been taken from that order. (3 *John. Ch.* 553. 4 *Id.* 199. 1 *Id.* 438. 1 *Paige*, 270. 2 *John. Ch.* 245.)

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**THE CHANCELLOR.** The objection that the residuary legatees and all other persons who were entitled to legacies under the will should have been made parties to the suit, was not made in the answer of the defendants. It was too late, therefore, to make it at the hearing; even if the objection would have been valid if made in the answer, or by a demurrer to the complainant's bill. I think, however, all the necessary parties were before the court to enable the complainant to claim his general legacy under the fourth clause of the will. The bill showed that no account was necessary; and as a general rule a legatee may sue the executor for his own particular legacy without making the residuary legatees, or any other legatees, parties to the suit. The case is otherwise where one of the residuary legatees sues for his share of the residue. For as an account of the estate must be taken in that case, the executor may insist that the other residuary legatees shall be brought before the court; to save him the trouble of accounting, a second time, at their suit. (*Pritchard v. Hicks*, 1 *Paige's Rep.* 270.) It is true the particular legacy claimed, if allowed, will reduce the fund bequeathed to the residuary legatee, who is therefore interested in the question. But this is one of those cases in which the interest of the residuary legatee is protected by representation; the executors representing the residuary estate and those interested therein, for the purpose of protecting it against all prior claims upon it, which might diminish its amount. (*Calvert on Part.* 20. *Wainwright v. Waterman*, 1 *Ves. jun.* 313. *Anon*, 1 *Vern.* 261. *Lawson v. Baker*, 1 *Bro. C. C.* 303.)

The declarations of the testator could not be received, as evidence of what he intended by the terms nephews and nieces. But the situation of the testator's family relatives, and the fact that these grand-nephews and nieces, together with the child of the complainant's deceased sister, were at the time of the making the will the only representatives of the testator's deceased sister Elizabeth, are proper to be taken into consideration, in connection with what appears upon the face of the will,

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for the purpose of giving a construction to the fourth clause, and to ascertain what the testator meant.

As a general rule, in the construction of wills, the testator must be presumed to have used words in their ordinary or primary sense and meaning; unless from the context of the will it appears that he must have intended to use them in some other, or secondary sense; or where by reference to extrinsic circumstances which existed at the time of making of the will, or which must necessarily exist in the event or at the time contemplated by him, the use of such words in their ordinary, or primary sense, would render the provision of the will in reference to which such words were used insensible, absurd, or inoperative. Thus the word children, in its primary and ordinary sense, means the immediate legitimate descendants of the person named. And where there is nothing to show that the testator intended to use it in a different sense, it will not be held to include illegitimate offspring, step-children, children by marriage only, grandchildren, or more remote descendants. (*Radcliffe v. Buckley*, 10 Ves. 195. *Earl of Orford v. Churchill*, 3 Ves. & Bea. 69. *Izard v. Izard's Ex'rs*, 2 Desaus. Rep. 309. *Gardner v. Heyer*, 2 Paige's Rep. 11. *Hussey v. Berkeley*, 2 Eden's Rep. 194.) The words nephews and nieces, likewise, in their primary and ordinary sense, mean the immediate descendants of the brothers and sisters of the person named; and do not include grand-nephews and grand-nieces, or more remote descendants. (*Falkner v. Butler*, Amb. Rep. 514. *Shelly v. Bryer*, Jacob's Rep. 207.) But there are several circumstances, in the case now under consideration, from which it may fairly be inferred that the testator, in the fourth clause of his will, used the words nephews and nieces in a secondary sense; so as to include the more remote descendants of his sister Elizabeth, except her grandson John Cromer. The fact that the testator excepts John Cromer by name, he being a grand-nephew only, from the class of nephews and nieces to whom he gave legacies of \$500 each, and that he also gave a similar legacy to his children collectively, by the description of the children of his nephew John Cromer, very clearly shows he

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did not intend to confine his bounty to the immediate descendants of his brother and sisters only, in cases where immediate descendants had died leaving issue.

Again ; I infer from the bill and answer, though that fact is not stated in terms, that the testator's brother was a lunatic, and had been under the charge of the testator as his committee. The principal part of the estate is given to that brother for life, and after his death it is devised and bequeathed to all the testator's collateral heirs. And the third and fourth clauses of the will appear to have proceeded upon the principle of giving to each of those who were to share in the ultimate remainder, in the residuary estate, a legacy of \$500 in the meantime. The testator therefore, by the third clause of the will, gives to each of the children of his sister Catharine a legacy of \$500 ; and then, by the fourth clause, he gives to each of his other nephews and nieces, except John Cromer, whose children are provided for in the 10th clause, a similar legacy of \$500. And as the testator himself showed that the words nephews and nieces were not used in their primary sense, of immediate descendants of brothers and sisters, they were broad enough to reach more remote descendants of his sister Catharine, if any of her children had died, leaving issue. But it would be out of the usual course of construction to give to the children of his sister Catharine double portions, or distinct legacies, under the third and also under the fourth clauses of the will ; or to permit both parents and children to take under the description of nephews and nieces of the testator. The vice chancellor was therefore right in holding that the three children of Catharine Emerson were not entitled to legacies, and that she took a legacy, as a niece of the testator, under the fourth clause of his will.

I am also inclined to think the vice chancellor was right in deciding that the great-grand-niece of the testator, Mary Elizabeth Ferris, whose ancestors of his blood were all dead at the time of making the will, was also entitled to a legacy under the fourth clause of the will. But even if the declaration in the decree is wrong in that respect, it cannot be reversed or altered upon this appeal, to which that legatee is not a party. The

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decree, therefore, clearly is not erroneous so far as the rights of the parties to this appeal are concerned. It must therefore be affirmed, with costs.

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MUIR and others vs. THE TRUSTEES OF THE LEAKE AND WATTS ORPHAN HOUSE and others.

A bill, by persons claiming to be next of kin of a testator, against the executors, for an account, making persons claiming an interest in the personal estate, as next of kin, parties defendants, but alleging that the latter have no right, title, or interest in the estate, either as next of kin or otherwise, is demurrable, as to them.

Under the provisions of the revised statutes no one can be liable to account to the next of kin, as an executor of his own wrong. Where persons have received and disposed of the property of a testator, without having been duly appointed his executors, or duly authorized to act as such, they are liable to his personal representatives, whenever such representatives shall have been appointed; but not to persons claiming to be next of kin of the decedent merely.

The proper course for the next of kin, in such a case, is to procure the appointment of an administrator, and have a suit instituted in his name, to recover the property from any person into whose hands it may have come, and who has converted it to his own use.

Where it appears that the will of a testator has been duly admitted to probate, so as to render the appointment of the executors valid, and to give the next of kin a claim upon them for the property of the testator not validly and effectually disposed of by will, such next of kin, in a bill by them against the executors, claiming that the decedent died intestate, and asking for an account of the personal estate, are bound to state what the testamentary paper was upon which the surrogate granted letters testamentary to the executors; so that the court may see whether the testator in fact died intestate as to any part of his personal property.

The probate of a will of personal property, whether such probate was obtained by a summary or a plenary proceeding, if granted by the proper testamentary court, is conclusive evidence of the due execution of such will; until such probate has been called in, or annulled, by such court; or has been reversed on appeal to the proper tribunal.

To enable a defendant to take advantage of the statute of limitations, upon demurrer, it must distinctly appear, by the bill itself, that the complainant's remedy is barred by lapse of time.

THIS case came before the chancellor upon demurrers to the complainants' bill. The complainants claimed to be the only

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next of kin of the late John G. Leake of New-York, who died unmarried and without issue in June, 1827; and whose will was established by the court for the correction of errors, upon appeal, in December, 1829. (See 1 *Paige's Rep.* 348; 4 *Wend. Rep.* 168, *S. C.*)

The bill in this cause was filed in August, 1844, by Jennet Muir and twelve other persons, who alleged that they were the grandchildren of Helen Martin, a sister of J. G. Leake's father. And The Trustees of the Leake and Watts Orphan House, the personal representatives of the executors of Leake, who were dead, and Herman Le Roy and William Bayard, together with Alexander Leck and eighteen other persons, who claimed to be interested in the personal estate of J. G. Leake, as his next of kin, were made defendants in the suit. The complainants, in their bill, after stating that they were the only next of kin of Leake, and tracing their pedigree from his deceased aunt, alleged that he died intestate, unmarried and without issue, in 1827, leaving personal estate of the value of more than \$250,000. They also stated that in 1830 J. Watts and H. Le Roy, both of whom were now dead, under the pretence that Leake, by some testamentary paper, had appointed them his executors, obtained letters testamentary from the surrogate, and possessed themselves of all of his personal estate; that they transferred and delivered a large portion thereof to The Trustees of the Leake and Watts Orphan House, without consideration, another large portion to the defendant Herman Le Roy, and another to the defendant W. Bayard, also without consideration; and that such executors appropriated the residue of such personal estate, amounting to more than \$50,000, to their own use. The complainants further stated that Alexander Leck and the other eighteen defendants, particularly named, who claimed or pretended to claim an interest in the personal estate of J. G. Leake as his next of kin, had not, nor had either of them, any right to, or any interest in, such estate, either as next of kin or otherwise. The complainants therefore asked for an account of the personal estate of Leake which had come to the hands and possession of The Trustees of the Leake and Watts



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Orphan House, the executors of Leake, and H. Le Roy and W. Bayard, respectively, with interest thereon, and that the payment thereof might be compelled, by the order or decree of this court, with the costs of the suit; or that the complainants might have such further or other relief as should be just upon the case made by their bill.

*Nelson Chase*, for A. Leck and the eighteen other persons named in the bill as claiming to be interested in the estate of J. G. Leake, as his next of kin, insisted that the complainants, by their own showing, had no right to make his clients parties to the suit; inasmuch as the bill charged that they had no right, title or interest whatever in the estate, either as next of kin or otherwise. And the chancellor, considering this objection as well taken, allowed the demurrer, and dismissed the bill as to those defendants; without hearing their counsel upon the other questions raised upon their demurrer.

*D. Lord & G. Wood*, for the Trustees of the Leake and Watts Orphan House, and for the personal representatives of the deceased executors of J. G. Leake.

*S. Stevens*, for the complainants.

**THE CHANCELLOR.** The complainants are not in a situation to contest the validity of the will of John G. Leake, which was admitted to probate, so far as respects the due execution of such will. For under the provisions of the revised statutes no one can be liable to account to the next of kin, as an executor of his own wrong. And if J. Watts and H. Le Roy received and disposed of the property of Leake, without having been duly appointed his executors, or duly authorized to act as such, they are liable to his personal representatives, whenever such shall have been appointed; but not to the complainants. (2 R. S. 449, § 17.) The proper course for the complainants, in that case, would be to procure the appointment of an administrator, and have a suit instituted in his name, to recover the

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property from any person into whose hands it may have come ; and who had converted it to his own use. (*Babcock v. Booth*, 2 *Hill's Rep.* 181.)

On the other hand, if the will of Leake has been duly admitted to probate, so as to render the appointment of the executors valid, and to give the next of kin a claim upon them for the property of the testator which was not validly and effectually disposed of by his will, the complainants were bound to state what the testamentary instrument was upon which the surrogate granted letters testamentary to the executors ; so that the court might see whether Leake had in fact died intestate as to any part of his personal property. The present bill, therefore, is fatally defective, in these particulars.

It would be useless also for the complainants to amend their bill in this respect. For, out of the bill, it is well known to the court that the testator's will, which was admitted to probate under the decree of a court whose decision must be considered as binding upon all other tribunals in this state, actually disposed of all his personal estate. And as the only question as to the validity of the execution of that will depended upon a question of law, there is no probability that a different result would be arrived at, even if there was any way in which these complainants could bring the question of the due execution of that will again before the probate court for decision. Although the will in this case had been proved in a plenary proceeding, as between the parties who appeared and contested it in the higher courts, the next of kin, who had no notice of that proceeding, and which occurred before the adoption of the revised statutes, might perhaps have cited the executors to bring in the probate, and to prove the will in a plenary form as to them, in the same manner as they could have done if it had been proved in the common form by a summary proceeding only, had they applied to the surrogate within a reasonable time. That appears to have been almost a matter of course, in the practice of the probate courts in England. And was very proper in our probate courts, until the revised statutes made all proceedings to prove wills plenary, in substance, by requiring all parties

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interested in opposing the will, to be cited to attend the probate, either by a personal service of the citation, or by a publication in the public papers. Even in that case, however, if the next of kin have not appeared and contested the will upon the probate thereof, they are permitted to come in within one year and file allegations and contest the probate or the validity of the will. (2 R. S. 61, § 30.) But the probate of a will of personal property, whether such probate was obtained by a summary or a plenary proceeding, if granted by the proper testamentary court, is conclusive evidence of the due execution of such will, until such probate has been called in or annulled by such court, or has been reversed on appeal to the proper tribunal. The validity of the will of John G. Leake cannot be inquired into by this court collaterally, therefore, in any form in which the question may be brought before this court by an original suit. For this reason it is not necessary to inquire whether the remedy of the complainants, if they ever had any, in this court, would not have been barred by lapse of time. It may be proper to say, however, that although it is alleged in the bill that the executors of *Leake* obtained possession of his property, &c. *in or about* the year 1830, it does not distinctly appear that it was more than ten years before the filing of the complainants' bill. And to enable a defendant to take advantage of the statute of limitations, upon demurrer, it must distinctly appear, by the bill itself, that the complainants' remedy is barred by lapse of time.

The demurrers of the Trustees of the Leake and Watts Orphan House, and of the other defendants who have demurred, and whose demurrers were not allowed at the hearing, must be allowed; and the bill as to those defendants respectively must be dismissed, with costs.

B. & S. WAKEMAN *vs.* BAILEY and DAVIES.

It is useless and improper to make the counsel of a person a party to a mere bill of discovery as to papers alleged to be in his possession; even if the matters inquired of by the bill could be properly disclosed by the counsel, if called as a witness against his client.

In ordinary cases, it is only necessary to call upon the client to answer as to the contents of the deeds or papers of which a discovery is sought; alleging that they are in his hands or in the hands of his attorney or counsel, and thus within his power. And the court, in the absence of any allegation to the contrary, will presume the client can obtain the actual possession, himself, by a proper application to his attorney or counsel.

Should that not be the case, however, the proper course is to make the bill of discovery against the client a bill for relief against him and his attorney or counsel, by charging that the latter will not deliver the deed or paper to his client, or permit him to examine it for the purpose of setting out its contents in an answer; or that the client alleges such to be the fact; and therefore praying that the defendants may not only discover whether the deed or paper is in the hands of the attorney or counsel, but that if it is in the hands of the latter he and his client may be ordered to produce it, or that the attorney or counsel may be ordered to produce it to his client, so that the latter may set it forth in his answer.

A party being bound, in the court of chancery, upon a bill of discovery, or for discovery and relief, to produce or discover the contents of deeds and other papers material to the prosecution or defence of the rights of the adverse party, that court, upon a bill properly framed, will give similar relief where the deeds or other papers are alleged to be in the possession of the party's attorney or counsel.

THIS was an appeal from a decretal order of the vice chancellor of the first circuit, allowing the demurrer of H. E. Davies, one of the defendants, to the bill of discovery filed in this cause. The complainants and B. Vail, who subsequently died, were copartners in trade in 1834, and as such copartners had a debt against the defendant Bailey for goods sold to him. After the death of Vail, the complainants brought a suit in the supreme court to recover that debt; in which suit Bailey gave notice that he would set off a certain draft or treasury warrant upon the Manhattan Company, received of him by Vail, and as the defendant alleged, for himself and the complainants as copartners. That suit was referred. And upon the hearing, before the referees, H. E. Davies was the counsel for the defendant Bailey; and the principal question then in controversy between the parties to that suit was whether the draft or treasury war-

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rant was passed to Vail upon his own account or as one of the copartners, for the use of the firm ; it having been credited to Bailey upon the copartnership books. The referees reported in favor of the complainants ; which report was afterwards set aside and a new trial granted. Upon the hearing before the referees it appeared that when Vail received the draft, or treasury warrant, he gave to the defendant Bailey therefor a note, or due bill, or a certificate, or some other voucher, signed with the individual name of Vail ; which written instrument Bailey or his counsel was requested by the complainants to produce before the referees, but he declined doing so. After the granting of the new trial, the complainants applied to a judge and obtained an order, requiring Bailey to make a discovery of the paper, signed by Vail, by producing and depositing the same with one of the clerks of the supreme court. But that order was subsequently revoked, upon the affidavit of Bailey that such paper was not in his possession or under his control.

The complainants thereupon filed their bill of discovery, in this cause, stating these facts, and alleging further that the production of the paper signed by Vail, or a discovery of the exact terms and contents of the same, was material and necessary to enable them to prepare for the trial of their suit in the supreme court ; and that without the aid of this court they would not be able, on the trial of that cause, to establish the precise form, nature and import of such paper. They also stated, upon their belief, that the paper in question, if it was not in the actual possession of Bailey, was in the possession or under the control of the defendant Davies ; or that it was so, or within his knowledge and reach, at the time when the complainants applied to the judge for an order to compel a discovery and production thereof by Bailey ; and that if it was not in the possession of Davies at the time of filing the bill in this cause, he knew where the same then was, and how or where or from whom it could be obtained. The complainants therefore prayed for an answer to their bill from both of the defendants, except that the defendant Davies was not required to discover or set forth the contents of the paper, any further than might be ne

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cessary to describe and identify it. They further prayed that Bailey might produce or discover the contents of the paper; and that if either of the defendants should deny that he had the possession of the same, or the control thereof, he might discover and set forth when, where, or in whose hands he last saw the same, whether it was or had been in his possession, and how long, and when he parted with or last heard of the same; and that Davies might discover whether he had made any search, inquiry or examination for the said paper, &c. But the bill contained no prayer for relief, being a bill of discovery merely.

The defendant Davies demurred to so much of the bill as required him to discover whether the paper in question was in his possession or under his control at the time of filing the bill, or at the time of the institution of the proceedings against Bailey for a discovery before the judge, or whether he knew where it was at the time of filing the bill, &c. or whether it was in the possession of Bailey, and whether Davies had not had the same in his possession, &c. And he stated as special grounds of demurrer, that the discovery sought would be a breach of professional confidence; that he was a mere witness, and could not be called upon to answer a bill of discovery; and that the joining him in the bill of discovery against Bailey was unnecessary and improper.

*A. P. Man*, for the appellants. It is the practice of this court to make an attorney or counsel party to a bill of discovery where he has withheld from his client and co-defendant papers required to be produced or discovered. (*Hare on Discov.* 171. *Fenwick v. Reed*, 1 Mer. 123. *Wright v. Mayer*, 6 Ves. 280.) It is also the practice of this court to compel an attorney or counsel to answer as to the existence of a paper of which discovery is sought, and as to its custody and where he last saw it. We do not require him to produce it, or to disclose its contents. (*Hare on Discov.* 171, 172. *Kingston v. Gale*, Rep. Temp. Finch, 259, 260. *Rothwell v. King*, and *Stanhope v. Nott*, 2 Swans. 221, note a.) The ends of justice require that this discovery should be made; and if made it will

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be effectual to the complainants, for upon a motion that the defendant Bailey produce the paper, the admission of his counsel as to the possession of it will be treated as the admission of the client. (*Hare on Discov.* 173. *Wright v. Mayer*, 6 *Ves.* 281. *Fenwick v. Reed*, 1 *Mer.* 126,) The discovery now sought cannot be obtained at law, for a court of law will not compel counsel to produce the paper or disclose its contents; and testimony of its existence and custody will then be too late to be of any use. (6 *Vesey*, *Boston ed.* p. 280 a, note a, and authorities there cited.)

*H. E. Davies*, for the respondent. The discovery sought of the defendant Davies involves a breach of professional confidence, and which he cannot make without a disclosure of the communications made to him as counsel by the defendant Bailey. (*Story's Eq. Plead.* § 599 to 602. *Greenough v. Gaskell*, 1 *Myl. & Keene*, 98. *Braid v. Ackerman*, 5 *Esp. Rep.* 119. *Wright v. Mayer*, 6 *Ves.* 280.) If it was competent for the defendant Davies to make such discovery, he could be examined as a witness in said suit at law, and the aid of this court is not necessary. (*Story's Eq. Pl.* §§ 323, 519. *Howe v. Best*, 5 *Mad.* 19. *Many v. Beekman Iron Co.* 9 *Paige*, 188, 193.) The discovery could be had at law, and after trial there and decision thereon, that decision cannot be reviewed in this court.

It is nowhere averred in the bill that the facts of which discovery is sought could not be proved by witnesses.

THE CHANCELLOR. It was useless and improper to make the counsel of Bailey a party to a mere bill of discovery, even if the matters inquired of by the bill could be properly disclosed, by the respondent, if called as a witness against his client. It is true the case of *Kingston v. Gale*, (*Rep. Temp. Finch*, 259,) and several other early cases before Lord Nottingham, referred to in the note to *Parkhurst v. Lawton*, (1 *Swanst. Rep.* 221,) appear to have been bills of discovery merely, if they are correctly reported. But I can see no possible benefit the complainant could derive from a mere discovery from an attorney

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in such a case; inasmuch as his answer could not be read in any suit or proceeding between the complainant and his client; the attorney being a mere witness. In ordinary cases it is only necessary to call upon the client to answer as to the contents of the deeds or papers of which a discovery is sought, alleging that they are in his hands or in the hands of his attorney or counsel and thus within his power. And the court, in the absence of any allegation to the contrary, will presume the client can obtain the actual possession himself by a proper application to his attorney or counsel. But should that not be the case, the proper course is to make the bill of discovery, against the client, a bill for relief against him and his attorney or counsel: by charging that the latter will not deliver the deed or paper to his client, or permit him to examine it for the purpose of setting out its contents in an answer, or that the client alleges such to be the fact. And therefore praying that the defendants may not only discover whether the deed or paper is in the hands of the attorney or counsel, but that if it is in the hands of the latter he and his client may be ordered to produce it; or that the attorney or counsel may be ordered to produce it to his client, so that the latter may set it forth in his answer. Such appears to have been the opinion of Lord Eldon in the case of *Fenwick v. Reed*, (1 *Meriv. Rep.* 123.) In the analogous case of a feme covert who was in possession of vouchers, belonging to her husband, of which a discovery was sought, Lord Eldon allowed the demurrer of the wife as to the discovery sought from her; no relief being prayed against her. (*Le Texier v. The Margravine of Anspach*, 15 *Ves.* 164.) The lord chancellor in that case said he expressed no opinion as to what would have been the effect of a prayer in the bill that the wife produce the vouchers. But I have no doubt that upon a bill properly framed, alleging that she had the vouchers and would not deliver them to her husband, and that he could not obtain them to produce them in the cause, and praying that she might discover and produce them, the court would have compelled an answer from her, to prevent a failure of justice; and if she admitted the vouchers to be in her possession, or under



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her control, would have compelled her and her husband to produce them.

It is true an attorney, upon the trial of a cause to which he is not a party, cannot be called upon to produce a deed which was intrusted to him by his client; or to give evidence of the contents thereof as against his client. But he may be examined, as a witness, to prove the fact that it is in his possession; so as to enable the adverse party to give evidence of its contents, by others. (*Brandt v. Klein*, 17 *John. Rep.* 335.) The reason why he cannot be compelled to produce the deed on the trial, under a subpœna *duces tecum*, is because the privilege is the privilege of his client. But if the client himself were bound to produce the deed, on the trial, then it would no longer be his privilege to have his attorney withhold it for him; and the attorney would be bound to produce it, on the subpœna, and under the order of the court, made upon his client, at the trial. And as the client is bound, in this court, upon a bill of discovery or of discovery and relief, to produce or discover the contents of deeds and other papers, material to the prosecution or defence of the rights of the adverse party, the court, upon a bill properly framed, will give similar relief; so that no perverseness on the part of the attorney, in refusing to deliver the papers to his client, or any collusion between them, shall prevent the adverse party from obtaining the benefit of a discovery.

But as this bill was not only defective in not containing proper averments as to the withholding of the paper in question from the client, or that the client alleged that it was so withheld, but was also defective in not stating that the paper, if produced, would show that the treasury draft or warrant was received on the individual account of Vail, and not as one of the members of the firm, so as to show that it was material in resisting the set-off claimed, and as no relief, by the production of the paper, was prayed against the respondent, the demurrer was properly allowed by the vice chancellor.

The order appealed from must therefore be affirmed with costs.

## HONE and others, ex'rs, &amp;c. vs. VAN SCHAIK and others.

[Reversed, 3 N. Y. 533.]

A testator who died leaving seven children, together with J. K. the daughter of a deceased son, and three children of another deceased son, his only heirs at law, surviving him, by his will directed that all his estate, real and personal, should be divided among his heirs, or their legal representatives, and prescribed certain rules to be observed by the executors in making such division. By one of those rules it was provided that in case both parents should be dead, and if their children, or any of them, had attained the age of twenty-one years, or were married, then that the executors should make an equal partition of the share which would have fallen to such parents, among their children. By another of those rules the testator's granddaughter J. K. was to be considered as standing in the same situation, with regard to her own rights, and the rights of her issue, as the testator's daughters; and all the rules applying to them, their husbands and issue, were to be applied to her and her husband and issue. By a codicil to his will the testator gave unto *each of his grandchildren living at the time of his decease*, the sum of \$6000, to be paid to them and each of them, upon their attaining, respectively, the age of twenty-one years, or marrying. At the time of the making of the will and codicil, J. K. was of the age of 21, and was married, and both her parents were dead. All the other grandchildren of the testator were under age and unmarried. At the date of the codicil J. K. had one child, and was *en ciente*, at the death of the testator, of a child born after his decease. She subsequently died, leaving four children surviving her. On a petition by C. K. the surviving husband, claiming that each of her two eldest children were to be considered as grandchildren of the testator, under the provisions of his will and codicil, so as to be entitled to legacies of \$6000 each, under the codicil:

*Held* that the testator did not intend to give a legacy of \$6000 to J. K.; but that he meant to give a legacy of that amount to each of her children who should be in esse at the time of his death, by the designation of grandchildren. And that each of her children who were in esse at the testator's death, was therefore entitled to a legacy of \$6000, to be paid to them upon their marriage, or on attaining the age of twenty-one; in the same manner as the other grandchildren.

*Held also*, that the child of which J. K. was *en ciente*, at the death of the testator, must be considered as in esse, at that time, for the purpose of entitling such child to the legacy of \$6000, as one of the grandchildren of the testator who were then living.

The word *children*, in its natural sense, only embraces the immediate descendants of the person named or described; and does not include descendants of a more remote degree.

Nor does the term *grandchildren*, without something further to extend its natural signification, include *great-grandchildren*.

A testator is to be presumed to have used words in their natural or primary sense unless there is something in the situation of his family, or in his will, to lead to contrary conclusion.

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But it is a cardinal rule, in the construction of wills, that the intention of the testator is to govern, if consistent with the rules of law. And he is not bound to use any particular form of words to devise or bequeath a legal interest in property, or to designate the objects of his bounty; provided he uses language which is sufficient to show his intention.

The testator's intention is to be ascertained from the whole will taken together, and not from the language of any particular provision or clause thereof when taken by itself.

For the purpose of construction, a will and a codicil may be considered together, and construed as different parts of the same instrument.

An unborn child, after conception, if it is subsequently born alive, and so far advanced towards maturity as to be capable of living, is considered as in esse from the time of its conception; where it is for the benefit of the child that it should be so considered.

THIS case came before the chancellor upon an appeal by C. Kneeland, one of the defendants, from a decretal order of the vice chancellor of the first circuit. John Hone died at the city of New-York in April, 1832, seised and possessed of a large real and personal estate. At the time of his death he left seven children, Isaac S. Hone, Henry Hone, Eliza the wife of M. Van Schaick, Judith the wife of J. Anthon, Joanna the wife of S. S. Howland, Ann the wife of J. Mathews, and Catharine the wife of C. A. Clinton. He also left surviving him Joanna the wife of C. Kneeland, the daughter of his deceased son Philip S. Hone; and three children of his deceased son John Hone, jun. These seven children and four grandchildren were his only heirs at law. And they, with the widow of the decedent, were the only persons entitled to distributive shares of his personal estate not validly and effectually disposed of by his will. In addition to these grandchildren, the decedent had about five and twenty other grandchildren, the descendants of his surviving sons and daughters.

In July, 1830, he made and published his will, in due form of law, by which he devised to his wife his mansion house for life, and all his furniture and plate, and an annuity of \$3600 in lieu of dower. And after directing the payment of his debts, he devised and bequeathed to his executors all his real and personal estate, except his wines and liquors, in trust for the purposes of his will. He then directed his executors to convert the

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personal estate into cash and invest the same on bond and mortgage, or in stock of the United States, and to lease his real estate in the city of New-York, and to sell that which was situated elsewhere and invest the proceeds in bonds and mortgages or in stocks; to the end that the rents and profits, interest, and dividends thence accruing might form a general fund, for the purposes of his will. He then directed them to pay out of that fund the annuity to his widow, and to a niece an annuity of \$200 for life; and to divide all the residue of that fund, from time to time, as it should arise from the income of his real and personal estate, equally among his heirs, naming them; the whole to be divided into nine shares, and one share to be given to each of his seven children or their legal representatives, one share to his granddaughter Joanna Kneeland, and one share to the children of his other deceased son John Hone, jun., in equal shares, in the manner mentioned in the subsequent part of his will. And he directed such income to be divided and paid to his children and other heirs quarterly, the shares of his five daughters and of his granddaughter Joanna Kneeland to be paid upon their own receipts, for their own separate use and benefit, free from the control of their then husbands or any future husbands; and the share of the children of his deceased son John Hone, jun. to be paid upon the receipt of their mother, or of their legal guardian in the event of her decease, until they respectively arrived at the age of twenty-one, and afterwards upon their own receipts. The seventh, eighth, ninth and tenth clauses of the will of the testator were as follows:

*“Seventhly.* It is my will, and I do hereby direct, that upon the decease of my said sons or either of them, leaving issue, and before the partition hereinafter provided for, the proportion of the income of my said estate directed to be paid to such my sons respectively shall then be paid in such wise as such my son shall, in and by his last will and testament direct; and should such my son or sons die intestate, leaving issue, then the same shall be paid to their respective widows for their support and the support and education of their children respectively should the wives of such my son or sons respectively survive

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them; and if not, then into the hands of a guardian to be duly appointed according to law. And should my said daughters or either of them die before the partition hereinafter directed, leaving issue, then it is my will, and I do direct, that the portion of the said income of my estate herein directed to be paid to such my daughters shall then be paid to their respective husbands, and if such husbands be dead then that the same be equally divided between and paid to such of the children of my said daughters as may have attained to the age of twenty-one years, or may be married, and into the hands of the legal guardian of such of said children as shall be under the age of twenty-one years and unmarried.

*Eighthly.* It is my will, and I do hereby direct, that after the expiration of twenty-one years from the date of this my will, and as soon as my executors, or the survivors or survivor of them shall then deem it discreet, all my estate, real and personal, shall be divided, by my said executors or the survivors or survivor of them, among my said heirs or their legal representatives, such legal representatives to take such share only, among them, as their immediate ancestor would have been entitled to if living.

*Ninthly.* In order to carry such partition into effect according to the intention of this my will, I do hereby direct that my executors, or the survivors or the survivor of them, in making the same, observe and keep these several rules, namely:

1st. In every case where the real estate is so circumstanced that an equal partition thereof can be made among my heirs without converting the same into cash, that then such sale be avoided and the said real estate be allotted among them by such process as may be just and proper.

2d. In making such partition of my said real and personal estate, in case both parents are dead, and their children or any of them have attained the age of twenty-one years, or are married, then that my executors make an equal partition of the share, which would have fallen to such parents, among the children of said parents, share and share alike, and to such as shall have attained the age of twenty-one years, or are married, to

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convey to them respectively in fee such real estate as may fall to them, and to pay to them such part of the personal estate as may fall to them respectively ; and as to such as may not then be of age and may be unmarried, that they invest their respective shares of personal property in bonds and mortgages, or in stock of this state or of the United States, and make proper demises of their real estate until they attain the age of twenty one years, or are married, and pay over the interest, dividends, rents and profits to them or their legal guardians, until one or other of the said events shall happen, and then to pay over to them respectively their shares of the personal estate, and to convey to them respectively, in fee, their proportion and shares of the real estate.

3d. In making such partition of my estate, if both parents are living having issue, then with regard to the personal estate forming the equal share of such parent, my son or daughter, to invest the same in bonds and mortgages or stock of the United States or of this state, in such manner as to yield the largest income, and to pay the same into the hands of such my son or daughter quarterly, in the manner, with the restrictions, and at the days and times, above directed with regard to the payments of the income to be made before such partition ; and with regard to the real estate forming the equal shares of such parents, my son or daughter, that such my executors, or the survivors or survivor of them, demise the same during the separate lives of such parents, and pay over the rents in like manner to such my sons or daughters ; such payments in the event of the death of such my sons or daughters leaving widows or husbands surviving, to be in all things regulated as is above directed with reference to the payment of the share of the said income before such partition. And upon the decease of both parents, then the personal property to be paid over, and the real estate to be divided, as is above directed in case of the decease of both parents before partition.

4th. In making such partition of my said estate & here both parents are dead, leaving no issue surviving, and where after such partition, both parents shall die, leaving no issue surviv-

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ing, the share of real and personal property which would have fallen to or may have been allotted as the share of the parents, my son or daughter, shall then be distributed according to the statute directing the distribution of the property of intestates among my surviving children and their legal representatives.

5th. The same rules, in all things, must be observed where real estate has been converted into personal estate by sales; the interest and dividend, upon investment, to stand in the place of rents in the demises.

6th. My granddaughter Joanna Kneeland to be considered as standing in the same situation with regard to her own rights, and those of her issue, as my daughters; and all the rules applying to them, their husbands and issue, to be applied to her and her husband and issue.

*Tenthly.* It is my will, and I do hereby direct my executors and the survivors or survivor of them, whenever my said sons shall so require it respectively, or their widows surviving them, and whenever my said daughters shall so require it, or their husbands respectively surviving, that they advance to any of my grandchildren, the issue of such my sons or daughters respectively, such part or portion of my estate, as upon a final distribution of my property would fall to such grandchildren or grandchild upon the death of their parents, as such my sons or daughters, or their respective widows or husbands surviving them may deem discreet; such advance however to be made only where such my grandchild may have attained the age of twenty-one years or be married, and in no event to exceed sixty per cent of the estimated value of such grandchild's share; such estimate to be made for the occasion by my said executors, or the survivors or survivor of them."

By a codicil, made in 1831, the testator increased the annuity, given to his widow by the original will, to \$4000; and gave to her his carriages and horses, and an equal participation with his heirs in his wines and liquors. He also increased the annuity to his niece forty dollars; and revoked the tenth clause of the original will, respecting advances to his grandchildren. The third and fourth clauses of this codicil were as follows:

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"*Third.* I do hereby give, devise and bequeath unto *each of my grandchildren* living at the time of my decease the sum of \$6000, to be paid to them and each of them upon their attaining respectively the age of twenty-one years, or marrying, whichever event shall first take place. Such payment, however is in no case to be made without the approbation of the parents of such grandchild, or the survivors of such parents, to be expressed in writing to my executors; it being my wish that after either of said events, the said parent or parents may fix a discreet and proper time for the payment thereof.

*Fourth.* It is my will and I do hereby direct the said last mentioned legacies to be paid out of my personal estate; and that all the rest, residue and remainder of my estate, real and personal, remain subject to the clauses and provisions in my said will expressed; each and every of the said clauses, however, to be and remain in like manner subject to the provisions of this codicil, and to be subordinate thereto."

By a second codicil, made in April, 1832, the testator further increased the annuity to his widow, to \$5000; and bequeathed to her and to his son Isaac S. Hone \$30,000, upon certain trusts which, as the codicil stated, he had disclosed to them.

Doubts having arisen as to the validity of the will and codicils, or of some parts thereof, the executors who had assumed the execution of the trust, filed their bill in this cause, before the vice chancellor of the first circuit, for a judicial construction of the will and codicils, and to obtain a decision of the court as to the validity of the several devises and bequests therein contained. The vice chancellor decided and decreed, among other things, that the devise to the executors of the testator, in trust, and all the trusts in the will based thereon; the direction in the will, to the executors to partition the real estate after the expiration of twenty-one years from the making of such will, and every thing in the will which was made to depend upon the execution of such trusts or which was dependant on such trusts or on the powers resulting therefrom, and every thing growing out of the trust and all the annuities payable out of the trust fund attempted to be created by the will, including



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the annuity to the widow of the testator, were void. But he decided and decreed that the devise of the testator's dwelling house to the widow, and the bequest to her of certain specific articles of personal property, in addition to the annuity, in lieu of dower were valid, provided she elected to receive the same in lieu of her dower. He likewise declared and decreed that the bequest of \$30,000 to his widow and one of the sons of the testator in trust for the purposes referred to in the last codicil, and the bequest of \$6000, in the codicil of 1831, to each of the grandchildren of the testator living at the time of his decease, and payable out of his personal estate, were valid. And the decree directed the executors to pay the same according to the directions of the codicils. Liberty was also reserved to the parties to apply to the court, from time to time, for further directions, upon the foot of the decree. This decree of the vice chancellor was affirmed, by the chancellor, upon appeal; and that decision was subsequently affirmed upon an appeal to the court of dernier resort. (7 *Paige's Rep.* 222. 20 *Wend. Rep.* 564.)

At the time of the making of the will and codicils, Mrs. Kneeland, the only child of the testator's deceased son Philip S. Hone, was of the age of twenty-one and was married, and her mother as well as her father was dead; the mother of the three children of the testator's deceased son John Hone, jun. was then living; and all the other grandchildren of the testator were under age and unmarried. At the time of the date of the first codicil Mrs. Kneeland had one child, and she was enciente at the death of the testator, and had another child born within four months after that time; both of which children are still living, and the appellant C. Kneeland is their general guardian. She subsequently had two other children, and died in February, 1837, leaving her husband and her four children, surviving her; one of which children afterwards died.

The appellant C. Kneeland presented his petition to the vice chancellor, pursuant to the reservation in the decree, stating these facts, substantially, and claiming that his two oldest children were to be considered as grandchildren of the testator under the provisions of his will and codicil, so as to be

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entitled to legacies of \$6000 each, under the first codicil and under the decree in this cause; and praying a direction to the executors to pay over the legacies to him, as the general guardian of his children, for their use and benefit; or if the court should decide that his two oldest children were not entitled to such legacies, as grandchildren of the testator, then the petitioner insisted that his deceased wife was entitled to a legacy of \$6000, as one of the grandchildren of the testator living at the time of his death, and that the executors should be directed to pay the same to him as her representative. The vice chancellor decided that neither Mrs. Kneeland nor her children were entitled to any legacy under the codicil of 1831. He therefore denied the prayer of the petition.

*G. Clark*, for the appellant. The two infant children of Joanna Kneeland, in esse at the time of the death of the testator, are to be considered as grandchildren, and each entitled to the legacy of \$6000. In the fifth clause of the will the testator enumerates and describes his heirs; and among them he describes the wife of the petitioner as follows: "Joanna Kneeland, wife of Charles Kneeland, and daughter of, and representing, my son Philip I. Hone deceased." And in the ninth clause of the will he prescribes certain rules for the government of his executors, in the execution of his will; the sixth of which rules is as follows: "My granddaughter Joanna Kneeland to be considered as standing in the same situation, with regard to her own rights, and those of her issue, as my daughters; and all the rules applying to them, their husbands and issue to be applied to her, her husband and issue." It is very evident that the testator, by his will, intended to dispose of his whole estate, real and personal; and for all the purposes of that distribution and partition he expressly declared and directed that his granddaughter Mrs. Kneeland (being the only representative of her father, a son of the testator,) should be regarded as a daughter; that she should represent one division of his estate, and that her issue should have the same rights, in all respects, as the issue of his daughters. In other words,

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sne was to be considered a *child* of the testator, and her children to be considered as *grandchildren*. The will was made in 1830; and at that time it is manifest that the intentions of the testator in regard to Mrs. Kneeland, were as above stated. In the following year he made the codicil, containing the clause in question; and there is no reason whatever for supposing that he had, in any respect, changed his views concerning her and her issue, or as to the light in which they were respectively to be considered, in the distribution of his property.

It is a well established rule that in construing wills the will and codicils are to be taken together as forming one will, one instrument; and that instrument as made at the date of the last codicil. (5 *John. Ch. Rep.* 343.) The codicil draws down the will to that date; being a republication thereof. (*Powell on Devises*, 683.) The whole will is to be considered, to ascertain the intention of the testator in any particular part. (11 *John. Rep.* 201. *Baldwin's C. C. Rep.* 459. 1 *Gall.* 454.) If then the will is viewed as having been made at the same time with the codicil, and all the provisions of both will and codicil are considered as embodied in one instrument, can there be a doubt as to the fact whether, in giving this legacy of \$6000 to each of his grandchildren, the testator meant to include the children of Mrs. Kneeland under that denomination? By the sixth rule for the government of his executors, the testator expressly declared that those children were so to be regarded. And there is no evidence whatever that he intended to exclude them from this legacy of \$6000.

The reasoning of the vice chancellor, showing why he thought that Mrs. Kneeland, herself, was not intended as one of the recipients of the \$6000 legacy, clearly demonstrates that her *children* were intended as such recipients. His honor says, "another reason for the conclusion (that Mrs. K. was not intended) is, that in previous parts of the will, the testator gives to Mrs. K. an equal share of his estate with his own children, both as regards the immediate income and the capital upon a partition which he directs to be made, putting her in the place of his deceased son, her father, and declaring that she was to

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be considered as standing in the same situation, with regard to her own rights and those of her issue, as his daughters, and all the rules applying to them, their husbands and issue to be applied to her, her husband and issue; thus putting her upon the footing of a daughter, with respect to a full share of his estate." This is very fair reasoning to show that Mrs. Kneeland was not intended; but it is still stronger to show that her children were intended to be included among the partakers of this legacy. The vice chancellor, however, after giving his reasons for excluding Mrs. Kneeland, proceeds to show why he thinks her children are also to be excluded. And here, we submit, his argument fails. He says, "The rules of law are against great-grandchildren taking, along with grand-children, under the general description of grand-children, unless from the context of the will it clearly appears the testator meant to include them." All this is undoubtedly true: and we say that from the context of the will in this case it does clearly appear that the testator intended to include Mrs. Kneeland's children under the denomination of grandchildren. Had he merely said that for all the purposes of his will Mrs. Kneeland was to be regarded as a daughter, that alone would have been sufficient to show he intended that her issue should be regarded as grandchildren. (2 *Eden*, 296.) But he has gone further, and expressly declared that her issue were to be regarded in the same light as the issue of his daughters. And it is difficult to perceive how he could have made known his intention in more explicit language. This intention, therefore, must govern; and the fact alluded to by the vice chancellor—that the bequest is to grandchildren, that there are persons standing in that relation to the testator and fully answering that description—is inconclusive, so long as the testator has declared that he intended to include others also, under that denomination.

When in the course of a will the testator has explained his own meaning in the use of certain words, the court should take that as their guide, without regard to etymological or abstract meaning of terms, or to different meanings put upon them in adjudged cases. (2 *Munf.* 234. *Hussey v. Berkley*, 2 *Eden*

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196.) The case last cited was similar to this, in all respects. There the testatrix gave a legacy to a person, calling her a granddaughter, when she was in fact a great-granddaughter. The court decided she was the person meant, because in another part of the will the mother of such person was called a child, although she was in fact a grandchild. The cases are numerous where grandchildren are included under the name of children, and great-grandchildren under the term grandchildren. (*Gale v. Bennet, Ambler*, 681. 4 *Ves.* 437. *Ambler*, 603. 2 *Vern.* 107, 108. 4 *Ves.* 692.)

The vice chancellor admits that the intention of the testator must govern, and that this is a case of construction as to what was the testator's meaning. And although he concedes that in one part of the will the testator has conceived a design to place Mrs. Kneeland on the footing of a daughter, and her issue on the footing of grandchildren, yet he seems to think that this design was limited to what the testator had then in view. What had he in view? Clearly the disposition of his whole estate. And the rules he established were to govern in respect to the distribution of his whole estate. If then he had a different design in the codicil, in respect to the persons who were to take, would he not have said so, in explicit terms? Would he have left it in doubt and uncertainty? The object of the codicil was to exempt a certain amount of his personal estate from the particular trusts and limitations contained in the will, and to distribute it in a different manner, but to the same families, and in the same capacities, and under the same denominations which he had already declared and prescribed respecting them.

If, however, it shall be adjudged that the clause in the will declaring in what character Mrs. Kneeland and her children are to be considered, is not to be extended to this provision of the codicil, then we say that Mrs. Kneeland must take the legacy in her own right, as a grandchild. Were it not for the clause in the will declaring in what character Mrs. Kneeland and her issue were to be regarded, she must of course have preferred the claim in her own right; and if that clause is to be entirely

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disregarded in respect to the provisions of the codicil, then what is to prevent her taking in her own right? It will be said that she cannot have been intended to be included because the two events on the happening of which the legacy of \$6000 was to be paid, had already passed, as to her; that is, she had attained the age of twenty-one, and she had married. It cannot be denied that this fact, if it can be supposed to have been known to the testator, strengthens the other position, that is, that he meant to include her children in this bequest, rather than herself. Yet if that position can by possibility be rejected, then the court will infer that the testator either did not know the fact of those events having passed, as to her, or that they had escaped his recollection; such an inference being far less violent and improbable than the supposition that he meant to exclude her altogether from this provision. And rather than come to the conclusion that she was to be excluded, the court will reject, as to her, the conditions as to the time of payment, as being inconsistent with the general intent of the testator.

In some cases equity will reject express words, to make the will take effect according to the testator's meaning; and will reject inconsistent or contradictory words. (2 *Dessau*. 32. *Com. Dig. Devise N. 24.*) The court is bound to carry the intention into effect; and if it can see a general intention consistent with the rules of law, but the particular mode is not, though that shall fail, the general intention shall take effect. (4 *Ves.* 329.) What was the general intent of the testator in this clause of the will? Clearly, to give each of his grandchildren, (or those he designed to include under that denomination,) living at the time of his decease, the sum of \$6000.

The time of payment is a distinct matter, and although postponed to a future period, the legacy was a vested legacy in each of the persons intended; and if the clause fixing the time of payment was inapplicable to some of them, that clause will be rejected, as to those persons. The particular intent must give way to the general intent. (2 *Bligh's Rep.* 49, 51. 4 *Dev. Rep.* 381. 1 *Yeates*, 342.) The amount of property, or the prudence of the disposition, afford no fair grounds for controlling

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a will. (4 *Ves.* 340. 1 *Mer.* 194.) The intent is to be collected from the will itself, and not from extrinsic circumstances. (*Cas. Temp. Talb.* 208. *Com. Dig. Devise N.* 24.)

There is one other circumstance deserving of notice. The testator left nine children, or representatives of children, and there were thirty grandchildren who would be recipients of this legacy of \$6000; thus taking from the general distribution of the estate near \$200,000, (a very considerable portion of the whole estate.) Some of the heirs had eight or nine children; thus by this codicil carrying into such family forty-eight or fifty thousand dollars beyond the general distributive share, while to the family of his deceased son, the father of Mrs. Kneeland, it would carry six or twelve thousand dollars, if our first position is maintained; and yet it is contended that even this is to be withheld, and that such was the testator's intention. The effect of the construction contended for by the respondents would be this; that although Mrs. Kneeland declaredly represents her father, and is to take one equal ninth part of the estate, in the general distribution, yet that by the operation of the codicil about \$200,000 is to be taken out of the estate for the benefit of the other heirs, before such general distribution is made, and that she is to take a share only in the residue, but that neither she nor her children are to have any share of the \$200,000 thus taken out. Such a construction is as inconsistent with every notion of equity as it is with the manifest intention of the testator.

*John Anthon*, for the respondents. There are two clauses, the one in the will of the testator, and the other in the first codicil annexed to it, which relate to the subject matter in controversy. The clause in the codicil has been substituted for that in the will, and annuls it. The examination of these clauses, therefore, must necessarily lead to a discovery of the testator's meaning; which is the object sought in the present case. The clause in the will is the tenth item. The testator had, in previous clauses, disposed of all his property, real and personal, in such way that his *children* were to have the income

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during their lives, and his *grandchildren* the principal of the personal, and the fee of the real, estate, after the decease of their parents. The terms children and grandchildren are throughout both the will and the codicil, used according to their proper acceptation, with the greatest care and strictness. And it appears that Mrs. Kneeland, the sole representative of a son, had been fully provided for, and that, from her situation, more advantageously than any other grandchild of the testator. In fixing the meaning of these clauses, the first thing which demands attention is the situation of the testator's family, at the time of making the will. Now when these dispositions were made the testator's family consisted of seven children, (all of whom were over the age of twenty-one, were married, and had issue,) and thirty-one grandchildren, thirty of whom were infants under the age of twenty-one years, and unmarried, and had one or both of their parents living. The remaining grandchild, Mrs. Kneeland, had lost both her parents, whose estate she had inherited as sole heir, was over the age of twenty-one years, was married, and every way well provided for, both in the will and otherwise.

The executors insist that Mrs. Kneeland was not contemplated by the testator, in these provisions of the will and codicil, neither of them being applicable to her case. The object the testator had in view, in making this provision in his will and codicil, and the inapplicability of each provision to Mrs. Kneeland, seems to the executors quite apparent from the whole instrument; and the more particularly so when the two sections are considered in detail. (1.) The will contemplates the case of a grandchild attaining the age of twenty-one in the lifetime of one or both parents. Such grandchild, from the terms of the will, would have an estate depending on the termination of the parent's life estate, but would have no power of immediate enjoyment. (2.) The will also contemplates the case of grandchildren marrying before the age of twenty-one, in the lifetime of one or both parents; who would be of course in the same situation. The first might require the advance of a capital for business, and the second for their establishment



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in married life. At the same time, however, many considerations might exist, making it necessary or discreet, on the part of the parents, to withhold any advance. The parents are the first objects of the testator's bounty, and may receive the income of the *whole* for their own necessities; or if such state of need does not exist, the unconfirmed character of the child, or other cogent reasons, may make the creation of such partial independence of the parents indiscreet. Hence the testator places in the hands of his sons and daughters, expressly, the full control over the whole matter—to grant or to withhold, in whole or in part. No grandchild, therefore, can claim any thing under this clause of the will, without the previous assent of the parent whose prudential control is very expressly invoked by the testator.

Now when the peculiar phraseology of the clause is considered, its restricted action in every way on sons and daughters, and their direct issue, and the special call for parental prudence, before it is allowed to take effect, it seems very clear that Mrs. Kneeland is excluded from its operation. All the contingencies had already occurred with regard to her. She had attained the age of twenty-one years, was married, had survived both parents, and the precision of the language used, as well as the absence of all necessity for any additional provision for her, shuts out the idea of Mrs. Kneeland, or *great* grandchildren being within the testator's contemplation. One year after this, the condition of the testator's family remaining the same, he revokes this clause of his will, and substitutes another in its stead, varying from it in no respect except in fixing the *precise* amount to be advanced, (\$6000.) All the prudential checks are retained, and even strengthened, by requiring that the parents' approbation, (which the testator, for most obvious reasons, constantly introduces as a prerequisite) should be in writing. It will be observed, upon perusing the codicil, that the same precise use of terms occurs throughout. Words are used in their primary and proper sense; opening no door whatever to the extension of the term *grandchildren*.

If the conclusion of the executors is correct, that the clause in the will already considered gave no rights to Mrs. Kneeland

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or her children, it seems very clear that none are created by this substituted clause in the codicil.

The counsel for the appellant insists that a certain other clause contained in the will must lead to a different conclusion. That clause is in these words: "My granddaughter, Mrs. Kneeland, to be considered as standing in the same situation, with regard to her own rights and those of her issue, as my daughters, and all the rules applying to them, their husbands and issue, to be applied to her husband and issue." The whole force of this section will manifestly depend upon the connection in which it stands, and the series of rules expressed therein, to which it refers, and of which it forms a part. The testator, in his will, contemplated a partition of his estate at a certain period, among his children and their representatives, and gave to his executors express and particular rules and regulations to guide them in making such partition. The clause relied upon, and above stated, comes in that connection; and stands as the sixth rule, under the ninth item of the testator's will; which item is entirely devoted to the mode and manner of making such partition. We insist that the peculiar structure of the will requires that this sixth rule should be confined expressly to its subject matter; and that it would be doing injustice to the testator's intentions to extend it beyond the manifest and particular purposes to which it was to be applied.

I do not think it necessary to discuss the other questions contained in the argument of the appellant's counsel; as they are abundantly and satisfactorily disposed of in the opinion of the vice chancellor, and in the cases referred to by him.

**THE CHANCELLOR.** It is stated in the affidavit in opposition to the appellants' petition in this case, that the deponent believes Mrs. Kneeland inherited a large estate from her father, and that she had expectations from her grandfather, who was a wealthy man. But these circumstances cannot affect the construction of the will or codicil in this case, as it is not shown that the other grandchildren of the testator were destitute of property, or that they had not similar expectations from the

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property of their parents, and from their grand-parents other than the testator. No reason therefore appears for making any discrimination between Mrs. Kneeland, or her children who might be in esse at the death of the testator, and his other grandchildren who might be then in existence. And it appears to be impossible to resist the conclusion that by the third article of the first codicil the testator either intended to give a legacy of \$6000 to Mrs. Kneeland, if she should be living at the time of his death, or that he intended to give a similar legacy to each of her children, who should be in esse at that time, by the description of grandchildren. The vice chancellor, therefore, appears to have erred in supposing that the testator intended to exclude the issue of his deceased son Philip S. Hone from the class of persons who were to have legacies of \$6000 each.

The question then arises as to which of the descendants of Philip S. Hone are entitled. Mrs. Kneeland was a grandchild of the testator and was living at the time of his death. She was therefore entitled to the legacy, unless there is something in the will, or in the codicil, to show that in relation to her or her children the testator did not use the word grandchildren in its primary sense. The word children in its natural sense only embraces the immediate descendants of the person named or described, and does not include descendants of a more remote degree. Nor does the term grandchildren, without something further to extend its natural signification, include great-grandchildren. It is true Lord Chancellor Henly, in the case of *Hussey v. Berkeley*, (2 *Eden's Rep.* 194,) expressed the opinion that the word grandchildren, without further explanation, would include great-grandchildren, unless there was something to indicate a contrary intention. But such is not the natural sense of the term grandchildren. And the testator is to be presumed to have used words in their natural or primary sense, unless there is something in the situation of his family, or in his will, to lead to a contrary conclusion. It is a cardinal rule, however, in the construction of wills, that the intention of the testator is to govern, if consistent with the rules

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of law: That is, the<sup>1</sup> testator cannot create a trust which the law prohibits, or suspend the power of alienation or the absolute ownership of property beyond the period allowed by law, nor create any other interest in property which the law repudiates. But he is not bound to use any particular form of words to devise or bequeath a legal interest in property, or to designate the objects of his bounty; provided he uses language sufficient to show his intention. That intention is to be ascertained from the whole will taken together, and not from the language of any particular provision or clause thereof when taken by itself. (*Crone v. Odell*, 1 *Ball & Beat. Rep.* 466.) And for the purpose of construction, a will and a codicil may be considered together and construed as different parts of the same instrument. (1 *Rob. on Wills*, 3d *Lond. ed.* 355.)

In the case under consideration, I think the will and the codicil, taken together, show that the testator did not intend the legacy of \$6000 for Mrs. Kneeland, but that he meant to give a legacy of that amount to each of her children; who should be in esse at the time of his death, by the designation of his grandchildren. Although the trusts attempted to be created by the will have been declared void and inoperative, as suspending the power of alienation of the estate beyond the period allowed by law, it is proper to look at the disposition which the testator intended to make of his estate, by his original will, for the purpose of ascertaining the meaning and intention of the provision in the first codicil for his grandchildren. The object of the testator, in his original will, was to create an absolute term of twenty-one years in his real and personal estate, during which time the capital was to be managed and controlled by his executors and trustees, and the income only divided among his children, or their representatives, in case of their deaths; and to give the control of such income to the surviving parent of his grandchildren during that term, if one of the parents was dead. And even after the expiration of the trust term, he intended that his children should enjoy the income of the property, during the continuance of their lives. This of course would leave those who were to have the ultimate remainder in

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fee in the estate wholly unprovided for during the lives of their parents ; and such parents could not furnish them any provision for the support of a family out of the capital of the estate, in the meantime. To obviate this difficulty, the tenth clause of the original will provided for an advance to the grandchildren of the testator, who should have married or have attained the age of twenty-one, with the assent of their parents or parent, not exceeding a certain proportion of the capital of the estate to which they would eventually become entitled under the provisions of the will ; which the testator supposed to be valid. All the grandchildren of the testator, except Mrs. Kneeland, were then under age and unmarried, and either one or both of their parents were living. Both of the parents of Mrs. Kneeland, however, were dead ; and she had become of age and was married, and had one child, at the date of the will. The testator therefore intended to put her and her husband and her children upon the same footing with his daughters and their husbands and children, in relation to the share of the estate which would have belonged to her father and his issue if he had then been living. And to carry into effect the intention of the testator in that respect, under the provisions of the original will, if they had been valid, the sixth subdivision of the ninth clause of the will would have been construed as being applicable to the partial division of the estate contemplated in the tenth clause of the will ; so as to authorize an advance to the children of Mrs. Kneeland, by the description of the testator's grandchildren, upon their marriages or the attaining their majorities, upon the request of their mother if living, or of their surviving father if she was dead.

What was the particular object of the testator in substituting an advance to each grandchild out of the estate generally, upon their marriage or attaining the age of twenty-one, instead of an advance out of the capital of the share of the parent, does not appear. But, that the legacy of \$6000 to each grandchild, given by the first codicil, was intended as a substitute for the provision made in the tenth clause of the original will, is evident. For immediately after providing for the payment of such lega-

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cies, the testator abrogates the tenth clause absolutely; and directs that the residue and remainder of his real and personal estate shall remain subject to the clauses and provisions of the original will. He also ratifies and confirms the will, in express terms, in every thing which is not revoked and altered by the codicil.

The testator having started with the principle of treating Mrs. Kneeland in every respect as one of his daughters, and placing her husband and her issue upon a footing with the husbands and issue of his daughters, the inference appears to be irresistible that he meant the same principle to apply to this substituted bequest of portions to his grandchildren, during the lives of their parents or of one of them. The provision in the codicil requiring the approbation of the parents, or of the surviving parent, to the payment of the legacy to the grandchild, would be entirely senseless upon any other construction. For the testator must be presumed to know the state of his family, and to have known that both the parents of his grandchild Mrs. Kneeland were already dead. But upon the supposition that he intended to place Mrs. Kneeland and her husband upon the footing of a daughter and a son-in-law, and their children upon the footing of grandchildren, as in the original will, that provision becomes perfectly sensible in relation to this branch of his family as well as in respect to all his other grandchildren. I conclude therefore that each of the children of Mrs. Kneeland who were in esse at the death of the testator is entitled to a legacy of \$6000, to be paid when they are married, or upon their attaining the age of twenty-one, in the same manner as the other grandchildren of the testator; and subject to the same restriction, that the capital of the fund is not to be paid over to them by the executors without the written approbation of their now surviving parent, while he continues to live.

Although the second son of the petitioner was not actually born before the testator's death, he must have been begotten many months before that event. He is therefore to be considered as in esse at the death of the testator, for the purpose of entitling him to this legacy; as one of the grandchildren of the

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testator then living. For an unborn child, after conception, if it is subsequently born alive and so far advanced to maturity as to be capable of living, is considered as in esse from the time of its conception where it is for the benefit of the child that it should be so considered. (See *Marsellis v. Thalhimer*, 1 *Paige's Rep.* 35, and the cases there referred to.) (a)

When the case under consideration was before the vice chancellor in 1841, the case of *Cutter v. Doughty*, (23 *Wend. Rep.* 513,) was unreversed; and the reported decision of the vice chancellor, (3 *Edw. Rep.* 474,) shows that he relied upon the opinion of Mr. Justice Cowen in *Cutter v. Doughty* as perfectly decisive of the present case. Since that time, however, the court of dernier resort has reversed the decision of the supreme court in *Cutter v. Doughty*; contrary, I admit, to my own opinion as to the intention of the testator in that case. (7 *Hill's Rep.* 305.) In the present case, however, I have no doubt of the intention of the testator to consider and treat Mrs. Kneeland as a daughter, and her children as his grandchildren, in the distribution of his estate among his descendants, in the first codicil as well as in the original will.

The decretal order appealed from must therefore be reversed; and a decree must be entered declaring the rights of the two oldest children according to this opinion; and directing the executors to pay them their respective legacies when they shall be entitled to the same according to the third clause of the codicil of August, 1831. The costs of both parties upon this appeal, as well as upon the original application to the vice chancellor, are to be paid out of the personal estate of the testator which is undisposed of by his will, and which is in the hands of his executors to be administered.

(a) See also *Mason v. Jones*, (2 *Barb. Sup. Court Rep.* 231.)

## LIVINGSTON vs. FREELAND and others.

What lands are primarily chargeable with the payment of an annuity to a widow in lieu of her dower, directed by a decree in partition to be paid by the owners of the several parcels of the land partitioned; which decree does not specify the order in which the several parcels are to be charged; and where some of the parcels have been alienated to different purchasers, and are subject to incumbrances.

Where an annuity, in favor of the widow of the testator, in lieu of her dower in all the real estate devised to his children, was charged upon the real estate of such devisees generally, and one of such devisees subsequently conveyed a part of the lands devised to him, and the grantees executed the conveyance and covenanted therein to indemnify the grantor against the debts of the testator and to perform all of the obligations imposed upon him as such devisee; *Held*, that the grantor's proportionate share of the annuity to the widow was primarily chargeable upon the lands thus conveyed to such grantees.

And where the grantees subsequently reconveyed to the grantor a part of the same premises, with covenants of warranty and seisin; *Held* that the residue of the premises, which remained in their hands after such reconveyance, was primarily chargeable with his share of the annuity; as between their subsequent grantees of such residue and the owner of the lands reconveyed by them to their original grantor.

Where the owner of a charge upon the lands of several persons, which charge is primarily chargeable upon the lands of one of them, with full knowledge of the equitable rights of the parties, releases the lands primarily chargeable, he will not be permitted to enforce his charge against the lands which are only secondarily liable.

The court of chancery, upon a mere petition in the original suit, cannot make a personal decree or order against a purchaser *pendente lite*, who is not a party to the suit, whereby property not in litigation in such suit can be affected. But to reach and affect such lands, a new or supplemental bill, against such purchaser, is necessary.

THIS case came before the chancellor upon an appeal, by Maria S. Bogardus, from a decretal order of the vice chancellor of the third circuit, overruling the exceptions to a master's report as to the part of the real estate mentioned in the decree in this cause, upon which a portion of the answer of the defendant Ann Eliza Freeland, mentioned in her petition, was properly chargeable under such decree, and the order in which the real estate upon which it was a charge should be sold to satisfy the arrears of dower.

Henry Livingston the elder, the first husband of the defendant Ann Eliza Freeland, died in November, 1828, leaving his



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widow and eight infant children surviving him; among whom were Henry Livingston the younger, Herman Livingston, Emma now the wife of Alonzo Bogardus, and Catharine now the wife of J. S. Talbot. At the time of his death he owned two farms in Columbia county, called the homestead and Monell farms; and three-eighths of certain ore beds in Salisbury, in the state of Connecticut. He also owned lot No. 1 of the subdivisions of great lot No. 3 in Livingston's manor, in the county of Columbia, containing about 13,000 acres of land; including the Ancram farm and iron works and coal lands, which he specifically devised to his son Henry, and which embraced about 4500 acres of lot No. 1. By his will he gave all his real and personal estate to his wife during the continuance of her widowhood; and appointed her the guardian of his children. After her death or remarriage, he devised to his son Henry the homestead and Monell farms, the Ancram farm and iron works and coal lands, and his interest in the Salisbury ore beds, and to his other children the residue of his estate equally. And for the purpose of making an equal distribution of his real estate among all his children, he directed it to be appraised, and that if the part thereof specifically devised to Henry exceeded his share, he was to pay enough to the executors, for the other seven children, to make their shares equal to his, and if less, the other children were to make it up to him.

In 1833 the widow married W. H. Freeland, who died in 1837. Previous to his death, however, he and his wife applied to the court of chancery for her dower in the real estate of her first husband, and obtained a decree allowing her an annuity of \$4000 out of the rents and profits of the estate, as and for her dower. In November, 1838, A. Bogardus and his wife mortgaged to J. P. Mesick and J. T. Best one-eighth of lot No. 1 of the subdivisions of great lot No. 3 in Livingston's manor, to secure the payment of \$13,545. In January, 1841, Herman Livingston filed his bill in this cause, against his brothers and sisters, for the partition of the premises devised to him and his brothers and sisters, and to obtain payment of the excess in value of the property specifically devised to his brother Henry

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And his mother and the mortgagees of A. Bogardus and wife were also made parties to the suit, as having specific liens upon the premises of which partition was sought. On the 27th of November, 1841, the vice chancellor made a decree declaring the rights of the several parties accordingly; and declaring that Ann Eliza Freeland was entitled to be paid annually, out of the rents and profits of the whole of the real estate of which Henry Livingston the elder died seised, the sum of \$4000, as and for her dower, pursuant to a decree to that effect made in July, 1835. Commissioners were also appointed to make partition of the testator's residuary estate among his children except Henry. And they were directed to appraise the real estate specifically devised to Henry, and also that devised to the other children of the testator, and to report the amount payable for owelty, according to the directions of the will.

In December, 1842, the complainant presented a petition, stating, among other things, that the commissioners had ascertained that the share of Henry greatly exceeded the shares of his brothers and sisters, that there were large outstanding claims against the estate; and against Mrs. Freeland, as the testamentary guardian of the children, incurred for their support and education. And a supplemental decree was thereupon made, authorizing the commissioners to sell a portion of the lands specifically devised to Henry, sufficient to equalize his share with those of the other children; for the purpose of paying such debts. A reference to a master was also directed, to ascertain the amount of the claims against the estate, and against the testamentary guardian, and to report which of the children were equitably chargeable therewith. The commissioners not being able to effect sales, in pursuance of this decretal order, and the defendant Henry Livingston having arrived at the age of twenty-one, an agreement was made between himself of the first part, and the complainant and A. Bogardus and J. S. Talbot of the other part, to obviate the necessity of having a sale to equalize his share and pay the debts. The substance of this arrangement was that Henry should convey to the complainant and Bogardus and Talbot the whole of the lands specifi

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cally devised to him by his father, except the homestead and Monell farms, so that the coal lands might be partitioned among the other seven children, for the purpose of equalizing the several shares; the grantees giving him back a mortgage for \$7000 on the Ancram iron works, including 70 acres of the Ancram farm; and covenanting, to indemnify him against the debts of the estate and the claims of the other residuary devisees of his father. In pursuance of this arrangement, on the 8th of July, 1843, Henry Livingston and his wife conveyed to Herman Livingston, A. Bogardus and J. S. Talbot, the Ancram farm and iron works, and the coal lands and his interest in the Salisbury ore beds. And they gave him back a mortgage for \$7000, upon the Ancram iron works, including 70 acres of land at and around the same. They also gave him a covenant to pay every claim, charge or demand which the other children and heirs of his father had against him, or his share of the estate, on account of the excess in the value of his share; and to indemnify him against the debts of the estate and the debts of his mother as testamentary guardian, and that they would perform all the obligations imposed upon him as the devisee of a specific portion of his father's real estate. The court sanctioned this arrangement, in behalf of the other children. And with the consent of the grantees a decretal order was made, on the 8th of August, 1843, directing the commissioners to partition the lands thus conveyed, except the Ancram iron works including the 70 acres, and about 95 acres of the Ancram farm on the west side of the creek. And the appraisal was then to be made for equality and the owelty decreed, in the same manner as if these additional lands to be partitioned among the residuary devisees of the testator had been a part of the lands devised to them; the grantees of Henry Livingston the younger being substituted as the persons who were to receive or pay the sum allowed for owelty. That decretal order further directed that the share of each of the children and heirs, and the homestead and the Monell farms, devised to Henry, should be severally charged with an equal part of the dower of the widow, and that such shares, except the homestead and Monell farms, should respectively be charged with

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the debts provided for in the agreement. In September of the same year, A. Bogardus and wife mortgaged to Stephen Gunn their interest in the land devised to Mrs. B. by her father, including the interest which she or her husband derived to lot No. 1 of the subdivisions of great lot No. 3, under the deed from her brother Henry; to secure the payment of \$5000. And on the 17th of November thereafter Bogardus and wife, and Talbot and wife, conveyed to Herman Livingston the 95 acres of the Ancram farm lying west of the creek, with covenants of warranty and seisin, and that the same were free from incumbrances. On the 18th of November, 1843, Herman Livingston and wife, A. Bogardus and wife, and J. S. Talbot and wife, conveyed the Ancram iron works and the 70 acres to Henry Livingston, with covenants of seisin and warranty, and against all incumbrances. And in March, 1844, Henry Livingston conveyed the same premises to Walter Shaffer, under whom J. D. Tanner, and J. Hall subsequently derived title to two-thirds of those premises. The homestead farm and the Monell farm were conveyed by Henry Livingston and wife to Herman Livingston, on the 18th of November, 1843, subject to the dower right of his mother, and also subject to the payment of a mortgage upon those two farms for \$10,000, given to J. S. Rosevelt on the 9th of September in the same year; and subject to other liens and incumbrances specified in the deed. And in the summer of 1844, Herman Livingston sold and conveyed his interest in the Salisbury ore bed, to Chittenden, who was not a party to this suit.

This was the state of the title to the several parcels of land which were subject to the charge of the widow's dower, as well as of the lands of which partition was sought in this cause, at the time of the final decree therein on the first of November, 1844. Previous to that decree the commissioners had made partition between all the children of Henry Livingston the elder, except Henry, not only of the lands of which partition was sought by the bill in this cause, but also of the coal lands, containing 4312 acres, which were a part of the premises specifically devised to Henry Livingston the younger, and by him conveyed to Herman Livingston and to A. Bogardus and J. S.

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Talbot previous to the decretal order of August, 1843. And the master, to whom the subject had been referred by a previous order of the court, reported in favor of a compromise between the devisees and the widow of the testator, by which she agreed to accept an annuity of \$1500 from the 2d of August, 1842, in lieu of the \$4000 per annum, which had been allowed her by a decree of the court; to be received by her in full satisfaction of all claims of the devisees against her. By such final decree the reports of the commissioners and of the master were confirmed. And the shares set off to the seven children, in severalty, were by such final decree each charged with the payment of one-eighth of the annuity, of \$1500, to Mrs. Freeland. And the shares of the premises allotted to Herman Livingston, Bogardus and wife, and Talbot and wife, and also the interest which the testator originally had in the Salisbury ore beds, the Ancram iron works, and 70 acres of land at and around the same, and 95 acres of the Ancram farm west of the creek were charged with the payment of the remaining eighth of such annuity, which would have been chargeable upon the property specifically devised to Henry Livingston the younger, if the conveyance of July, 1843, and the decretal order of the 8th of August in the same year had not been made. The decree further directed that if either of the seven children, between whom the partition was made, or the husbands of the daughters who were married, should at any time fail to pay Mrs. Freeland any part of the annuity with which they were charged on their own account, or with which Herman Livingston, A. Bogardus and James S. Talbot were charged as the grantees of Henry Livingston the younger, she should be at liberty to apply to the court, upon the foot of the decree, for the sale of the premises charged with the payment of the part of the annuity which was unpaid.

The debts due were apportioned in the same manner; and were charged upon the same portions of the property, as subsequent charges to the annuity to Mrs. Freeland for her dower.

After the decree, and previous to July, 1846, Herman Livingston conveyed three of the lots set off to him in the partition. And on the 22d of July, 1846, Mrs. Freeland released and

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quit-claimed to him all her right and claim to and upon the residue of the lands set off to him in such partition, except lot No. 1, and also all claim upon the 95 acres of the Ancram farm west of the creek. He had also paid and satisfied her for the arrears of her dower annuity charged upon his share of the premises set off to him in the partition, and for one-third of that eighth of the annuity which, by the decree, was charged upon the three shares allotted to Herman Livingston, A. Bogardus and wife, J. S. Talbot and wife, the Ancram iron works and 70 acres of land at and adjoining the same, the 95 acres of the Ancram farm west of the creek, and upon the interest which the testator had in the Salisbury ore beds at the time of his death.

On the 3d of February, 1845, Stephen Gunn, the mortgagee of A. Bogardus and wife, claimed that his mortgage was a lien upon their interest in the one-third of the 95 acres of the Ancram farm west of the creek, which they conveyed to Herman Livingston. Gunn thereupon received payment, from the latter, of the purchase money which was still due to Bogardus, on account of that conveyance, and released that 95 acres of the Ancram farm from the lien of his mortgage, and agreed to indemnify Herman Livingston against any claim on account of the payment of such purchase money to him.

On the 5th of February, 1845, a decree of foreclosure was obtained by Gunn, upon a bill filed by him against A. Bogardus and wife, for the foreclosure of the two mortgages before mentioned; which decree authorized a sale of the thirteen lots, constituting share No. 5 in the partition suit, that were by the decree in this suit assigned to A. Bogardus and wife, in severalty, as her one-seventh of the lands which were partitioned. The decree of foreclosure also authorized the sale of the whole of those thirteen lots for the payment of the aggregate amount reported due upon both mortgages. And on the 26th of March, 1845, all of the lots composing share No. 5, except lot No. 90 were sold and conveyed, by the master, under the decree, to S. Gunn, the complainant in the foreclosure suit, for \$14,050, leaving a balance of about \$6000 still due upon the decree

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On the 1st of September in the same year, Gunn conveyed to Maria S. Bogardus, the mother of A. Bogardus, the whole of share number five; except lot No. 59, and three acres of lot No. 40 and twelve acres of lot No. 42, which he had previously conveyed to others; and he at the same time assigned to her the decree of foreclosure. The same day A. Bogardus and wife gave to his mother a quit-claim deed of all their interest in share No. 5. And at the same time A. Bogardus conveyed to his mother all his interest in the Salisbury ore beds, for the price or consideration of \$2500.

J. S. Talbot, previous to the presenting of the petition, had sold and conveyed all his interest in the lands mentioned in the deed of July, 1843, except the Salisbury ore beds; and had paid to Mrs. Freeland his one-third of the one-eighth of the arrears of the annuity which was charged jointly upon the lands assigned to his wife and to Mrs. Bogardus and to Herman Livingston respectively, and upon the Ancram iron works and the 95 acres of the Ancram farm west of the creek, and upon the Salisbury ore beds. And Mrs. Freeland thereupon had released the lots composing the share of Mrs. Talbot in the partition, or some of them, from the lien of that eighth of her dower annuity.

The other third of that eighth of the annuity not having been paid, Mrs. Freeland presented her petition to the vice chancellor for the sale of the property charged with the payment thereof, and which she had not released, or of so much thereof as might be necessary to satisfy the arrears of the annuity so remaining due. And a reference was directed to a master, to ascertain the amount due upon that portion of her annuity charged as and for the share of Henry Livingston, and the present value of that portion of the annuity upon the principle of life annuities; and to ascertain and report what part of the real estate that portion of the annuity which was then due or which might thereafter become due was chargeable by the decree in this cause, and the order in which the same should be sold. The master reported that Herman Livingston had paid one-third of that eighth of the annuity, and J. S. Talbot had paid another third thereof, and that there was due and payable for the prin

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capital and interest of the remaining one-third \$246,44, at the date of the report ; and that the present value of the said one-third, which would thereafter become due, upon the principle of life annuities, was \$579,56. He further reported, that the share of the Salisbury ore beds which A. Bogardus acquired by the conveyance from Henry Livingston, and the lands set off to A. Bogardus and wife, under the decree in this cause, as share No. 5, should be sold to pay the amount reported due, and to pay the present value of that third of that portion of the annuity hereafter to become due. But as his interest in the Salisbury ore beds, which was first chargeable, was out of the jurisdiction of the court, being in another state, that lot No. 90 of share No. 5 should first be sold ; and after that, the remaining lots of share No. 5, which had all been alienated at the same time and by the same conveyance.

Maria S. Bogardus excepted to the report, because the master had not stated all the property upon which the dower annuity in question was chargeable by the decree ; because he had not stated that share No. 3, allotted to Herman Livingston, was properly chargeable with the payment of such dower annuity ; because he had not stated that share No. 1, allotted to Talbot and wife, was properly chargeable with the payment thereof ; because he had not stated that the Ancram iron works, and 70 acres at and about the same, and the 95 acres of the Ancram farm west of the creek, were properly chargeable with the payment thereof ; because the master had reported that the present value of one-third of the annuity charged as and for the share of Henry Livingston was \$579,56 ; because he had stated that the interest acquired by A. Bogardus in the Salisbury ore beds should be sold to pay the amount of that portion of the annuity ; because he had stated that share No. 5, allotted to A. Bogardus and wife, should be sold to pay that portion of the annuity due or to become due ; because he had reported that lot No. 90 of that share should first be sold, and the residue of that share should secondly be sold ; because he had not reported that the Ancram iron works and the 70 acres at and around the same should first be sold, and the 95 acres of the Ancram



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farm west of the creek should be secondly sold; and because the master had not reported that Mrs. Freeland had released the 95 acres of the Ancram farm west of the creek, and certain lots allotted to Herman Livingston in the partition, and that thereby the share No. 5, allotted to Bogardus and wife, was absolutely released and discharged of the lien and payment of the part of the annuity in question. The vice chancellor overruled all the exceptions, with costs.

*M. Pechtel*, for the appellant.

*J. W. Fairfield*, for Ann Eliza Freeland.

*C. L. Monell*, for Herman Livingston, and for Shafer, Hall & Tanner, the owners of the Ancram iron works and the 70 acres at and around the same.

THE CHANCELLOR. The objection that the master has not stated in his report all the property upon which the part of the annuity in question in this case is chargeable, by the decree, is one in which the appellant has no interest, if the master is right in supposing that the lands and premises now belonging to her are primarily liable for the payment of that part of the annuity. As I understand the case, Herman Livingston has satisfied one-third of this eighth of the annuity; and has obtained a release from Mrs. Freeland for all the lands belonging to him at the time of the decree of November, 1844, upon which that eighth of the annuity was charged by that decree; except certain lands which he had conveyed to others previous to such release, and lot No. 1 of his share. Talbot's affidavit also shows that he has paid another third of that eighth of the annuity, and has conveyed all the lands in this state which were included in the deed of July, 1843. The contest between the parties, therefore, is as to which property shall be charged with the remaining third of that eighth of the annuity. And if the lands which originally belonged to Mrs. A. Bogardus, under the will of her father, did not now belong to the same person

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who owns the husband's share of the property which was purchased from Henry Livingston the younger, or enough thereof to satisfy the whole of that portion of the annuity, there might be some difficulty in sustaining the master's report.

The decree of the first of November, 1844, does not profess to designate the order in which the lands that, by such decree, were left subject to the lien of the eighth part of the widow's annuity thereon, as and for Henry's share of such annuity, shall be charged. It is necessary, therefore, to inquire what were the equitable rights of the parties, at the time of the making of that decree. The share of Henry Livingston the younger originally was all primarily chargeable with this portion of the dower of his mother. But in the arrangement of July, 1843, he conveyed to Herman Livingston and to his two brothers-in-law, Bogardus and Talbot, all the lands specifically devised to him, except the homestead and Monell farms, and they gave back to him a mortgage for \$7000 upon the Ancram iron works and 70 acres of the Ancram farm around such works. And it appears by the recitals in the decree, that the grantees in that conveyance covenanted to indemnify the grantor against the debts, and to perform all the obligations imposed upon him by reason of his being named as a devisee of a specific portion of his father's estate. This of course included an obligation to discharge him, and the two farms which were left to him, of the annuity which by a previous decree had been charged upon him and his estate. It is true, the charge of the mother upon his two farms was not released by this arrangement; but that part of his share of the devised estate which was granted to his brother and his two brothers-in-law became, in equity, primarily chargeable with the payment of his share of the annuity. And as between the Ancram iron works and the 70 acres of the Ancram farm which they mortgaged to him at the time of his conveyance to them, and the residue of the lands granted to them, such residue was equitably chargeable with the whole of his share of the annuity; as the primary fund for the payment thereof.

Again; the same grantees and their wives, a few months afterwards, made an absolute conveyance, to Henry Livingston

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the younger, of the Ancram iron works and the 70 acres adjoining the same; with full covenants of warranty and of seisin, and against all incumbrances thereon. That conveyance, therefore, independent of the equity acquired under the \$7000 mortgage, gave to the grantee therein, and his assigns, an unquestionable equity to have the eighth of the annuity originally chargeable on the whole of the lands devised to him, charged primarily upon the other lands conveyed to Bogardus, Talbot, and Herman Livingston, in July, 1843. But as Talbot and Bogardus had conveyed two-thirds of the 95 acres of the Ancram farm to Herman Livingston, with warranty, their two-thirds of the coal lands and of the testator's original interest in the Salisbury ore beds became primarily chargeable with the whole of their two-thirds of that eighth of the annuity. And as Herman Livingston had conveyed his interest in the Salisbury ore beds to Chittenden, his third of the coal lands and his interest in the 95 acres of the Ancram farm, were primarily liable for the payment of his one-third of this eighth of the annuity. The mortgage from Bogardus and wife to Gunn was prior in date to the deed from Herman Livingston and his two brothers-in-law to his brother Henry. But inasmuch as it embraced other lands besides the interest which Bogardus acquired, under the deed of July, 1843, in the coal lands, and in the Ancram iron works and the Ancram farm, such other lands were primarily liable in equity for the payment of that mortgage; before resort could be had to the Ancram iron works and the 70 acres around the same, or the 95 acres of the Ancram farm, which the mortgagors had subsequently conveyed, with warranty. Such were the equities of the several parties, interested in the lands upon which Henry Livingston's eighth of the annuity was chargeable, at the time the final decree in the partition suit was made, in November, 1844. That decree, however, not only changed the title to the coal lands previously owned by Herman Livingston and his two brothers-in-law, as tenants in common, by assigning portions thereof to other members of the family of Henry Livingston deceased, and giving the wives of Bogardus and Talbot interests in such lands, but it also charged this eighth

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of the annuity upon other lands set off to Herman Livingston in his own right, and to Bogardus and Talbot in right of their respective wives. In doing this, however, no injustice was done to the wives of Bogardus and Talbot, or to the mortgagees to whom Bogardus and wife had mortgaged seven-eighths of their interest in subdivision No. 1 in great lot No. 3, in November, 1838. For the lands set off to Mrs. Bogardus, and to Mrs. Talbot, respectively, in severalty, including a share of the 4312 acres of the coal lands, were much more valuable than their shares of the lands as originally devised to them by the will of their father. These coal lands, as proved by the testimony of Augustus Tremain before the master, were worth, on an average, from eighteen to twenty dollars an acre. This, at the lowest estimate of the witness, would increase the value of each share about \$11,000. For by the will of the testator the excess in the value of the lands devised to Henry was not to be made up to the other devisees in land; but was to be paid to the executors in money, for the use of such devisees. It was therefore personal estate, which belonged to the husbands of Mrs. Bogardus and Mrs. Talbot, by virtue of their marital rights, and was not subject to the lien of the mortgage to Meseck and Best. The increased value of the lands which were assigned to the shares of Mrs. Bogardus and Mrs. Talbot, in the partition, was therefore much more than an equivalent to them, and to Meseck and Best the mortgagees, for the two-thirds of Henry Livingston's eighth of the annuity; which by the decree were charged upon the whole shares of the estate assigned to Mrs. Bogardus and Mrs. Talbot in severalty, as well as upon the lands and property embraced in the deed, to their husbands and their brother Herman, of July, 1843. It is therefore perfectly equitable and just that the lands thus assigned to these two ladies, in the partition suit, should bear the charge of this part of the annuity, instead of the Ancram iron works and the 70 acres of land connected therewith; which had been previously conveyed to Henry Livingston with full covenants of warranty and seisin and against all incumbrances thereon.

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Had it not been for this increase in the value of the real estate assigned to Mrs. Bogardus and Mrs. Talbot, the one-third of the coal lands and one-third of the testator's share of the Salisbury ore beds, which Bogardus acquired under the deed of July, 1843, would, in equity, have been first chargeable with his third of this eighth of the annuity, and the one-third of the same property which Talbot acquired, by that deed, would have been primarily chargeable with his third of this eighth of the annuity. And these would have constituted an ample fund to satisfy these portions of the annuity, in addition to Stephen Gunn's mortgage; which was taken *pendente lite*, and subject to the third of Henry Livingston's eighth of the annuity which was chargeable upon the part of the mortgaged premises which was embraced by his deed of July, 1843.

The subsequent foreclosure of the two mortgages, in a suit to which neither Mrs. Freeland nor the owners of other lands upon which this part of the annuity was charged, by the decree in partition, were parties, could not divest the equitable lien of Mrs. Freeland upon the premises sold under the decree of foreclosure, nor alter the equitable rights of any of such owners, in reference to the charge of this portion of the annuity. Indeed the decree of foreclosure is entirely erroneous upon its face, so far as respects these equitable rights. For the mortgage to Meseck and Best did not embrace any portion of the coal lands, and only seven-eighths of the original interest of Mrs. Bogardus in the real estate of her deceased father. And yet the decree of foreclosure directs the whole share No. 5 assigned to Mrs. Bogardus in the partition suit, including her share of the coal lands and the whole of her original *one-seventh* of her father's real estate, which she took under the will, to be sold to satisfy the aggregate amount due upon both mortgages, and the costs and expenses of the foreclosure.

It is not necessary, however, now to inquire what would have been the equities as between Gunn, the holder of the two mortgages, and the respondents in this case, in reference to the lien of Alonzo Bogardus' third of this eighth of the annuity if Gunn had not transferred all his interest in share No. 5 to

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Maria S. Bogardus, the appellant. For the appellant having become the purchaser of all the interests of A. Bogardus and of his wife, not only in share No. 5, but also in the Salisbury ore bed, which at the time of the conveyance to her was primarily liable for the payment of his third of Henry Livingston's one-eighth of the annuity, she was in equity bound to pay off and discharge that third of this eighth of the annuity, or to appropriate her interest acquired under the deeds of A. Bogardus and wife for that purpose. And no one can doubt that the interest thus acquired by her, under the two deeds of A. Bogardus and wife, of the 1st of September, 1845, was more than sufficient to satisfy his share of this eighth of the annuity, in addition to all prior liens thereon.

It is true the Salisbury ore beds are not within the limits of this state, and therefore could not be sold by a master, under the decree in this cause, so as to transfer the legal title of the appellant to a purchaser. And as Maria S. Bogardus is not one of the parties to this suit, but is merely a purchaser pendente lite, a decree cannot be made upon the petition in this case, under which the reference to the master was ordered, directing her to join with the master in a deed so as to transfer her title to the ore beds to a purchaser under the decree. But her interest in the ore beds being primarily liable in equity for the payment of this third of Henry Livingston's one eighth of the annuity, that interest may be reached, and applied to the satisfaction of this equitable lien thereon, either by an original bill in the state of Connecticut, or by a supplemental bill filed against her here. There is also a lien, however, upon the interest which she acquired under the deed of September 1st, 1845, in share No. 5 of the lands in this state which was assigned to Bogardus and wife under the decree in partition; and that share may be sold under an order to be made upon this petition of Mrs. Freeland which was presented under the provisions of the original decree.

Such being the rights and equities of the parties, it only remains to be seen whether any of the exceptions of the appellant were well taken. As the lands of the appellant were primarily

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chargeable with all the arrears of this third of the eighth of the annuity in question, and also with the future payments, she could not object that the master had not reported what lands of other persons were secondarily liable for the payment thereof. The first and second exceptions were therefore properly overruled. And it also would have been erroneous for the master to have reported that any portion of the eighth of the dower annuity charged by the decree as and for Henry Livingston's share, whether due or thereafter to become due, was then chargeable upon the lots mentioned in the third and fourth exceptions, other than lot No. 1. For the others of those lots had either been released by Mrs. Freeland, or had been previously conveyed by Herman Livingston; and were therefore discharged by the release to him of the lots which were first chargeable as between him and his grantees. For this reason, as well as for the reasons given for the disallowance of the previous exceptions, the third and fourth exceptions were not well taken.

The lot No. 1, which was assigned to Herman Livingston by the decree, is undoubtedly chargeable with his third of the eighth of the annuity which constituted the share originally chargeable upon Henry Livingston. And as Mrs. Freeland had released to Herman Livingston a portion of the lots which were primarily chargeable with that third, the lands of the appellant are equitably discharged from the payment of any part of the third which he ought to have paid, even if lot No. 1 should hereafter prove to be insufficient for that purpose. The same may be said in reference to the lands assigned to Talbot and wife in the partition, and which were primarily chargeable with Talbot's third of that eighth of the annuity, if Mrs. Freeland has released any of those lands. But as Talbot, as well as Herman Livingston, had paid up the arrears of their two thirds of this eighth of the annuity, and as the report only professes to state upon what lands the arrears and the future instalments of the other third is chargeable, it is of no consequence to the appellant that the master has not stated that lot No. 1 assigned to Herman Livingston and the several lots assigned

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to Talbot and wife are secondarily liable for the third which is primarily chargeable on the appellant's property. The vice chancellor was therefore right in overruling the fifth and sixth exceptions.

The Ancram iron works and the 70 acres at and about the same, having been conveyed by Herman Livingston and by Bogardus and wife, and by Talbot and wife, with full covenants of warranty, long previous to the decree in partition, although as between the owners thereof and Mrs. Freeland, they were still liable to her as a part of the security for Henry Livingston's eighth of the annuity, the grantors in that conveyance were bound to indemnify such owners against this charge upon the lands conveyed. And upon the principle of charging lands, which are subject to an incumbrance thereon, in the inverse order of their alienation, the whole of this eighth of the annuity became primarily chargeable upon the lands embraced in the deed of July, 1843, which remained in the hands of Herman Livingston and Bogardus and Talbot subsequent to their deed of the 18th of November in the same year, to Henry Livingston. And Mrs. Freeland having released a portion of the lands thus primarily liable, with full knowledge of the rights which Henry Livingston and his grantees had acquired under this deed of November, 1843, a court of equity would not now charge any part of the annuity upon the Ancram iron works and the 70 acres adjoining the same; even if the shares of Bogardus and Talbot in the Salisbury ore bed, and the other lands set-off to Herman Livingston and Bogardus and wife and Talbot and wife in the partition, which were primarily liable and which have not been released, should prove to be insufficient for the purpose of satisfying the charge. The seventh and eighth exceptions were therefore rightfully disallowed by the vice chancellor.

As the petitioner sought a sale of the lands and premises upon which the arrears of the annuity were properly chargeable, it became necessary to ascertain the value of the future instalments of the same share of the annuity; so that if a sale took place the proper directions might be given to retain the present



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value of the future instalments, out of the proceeds of the sale. And it was for the interest of the appellant to have the amount ascertained; so that if Mrs. Freeland consented to accept it in lieu of this portion of her annuity, the property of the appellant which is primarily liable for this part of the annuity might be discharged, without the expense of a further reference to ascertain the amount. The master also obeyed the order of reference in making that part of his report. The ninth exception was of course not well taken.

From what has been before said, it is evident the master was right in reporting that the interest which the appellant acquired of Bogardus and wife, in the Salisbury ore beds, ought to be sold to pay the amount reported due, if the same could be properly sold under the decree here; but as that could not be done, that the share No. 5, in Ancram, set off to Bogardus and his wife in the partition, should be sold for that purpose. The tenth and eleventh exceptions were therefore properly overruled.

As the whole of the arrears of the annuity are primarily chargeable upon the lands, and the interest in the ore beds, conveyed to the appellant, by A. Bogardus and wife, on the first of September, 1845, it was not very material to her what part of her property upon which these arrears were chargeable, was sold first. But I think the master decided right that lot No. 90, of share No. 5, which had not been affected by the sale under the decree of foreclosure, should be first sold; and then the residue of that share. The report does not mean that all the residue should be put up together and sold in one parcel; but that, as it was all conveyed at one time and to the same person, there is no reason why one separate lot or parcel embraced in that share should be sold in preference to another. In case a sale is directed, the decretal order will of course direct it to be sold in parcels; so that no more shall be sold than will be sufficient to pay the charges thereon for which the whole is primarily liable. The twelfth and thirteenth exceptions were therefore not well taken. And for the reasons before given in reference to the seventh and eighth exceptions, the fourteenth was properly overruled. Nor could the 95 acres of the Ancram

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firm which had been released by Mrs. Freeland be sold under the decree; and the fifteenth exception of course was not well taken.

There was nothing in the order of reference requiring the master to report what lands had been released by Mrs. Freeland to Herman Livingston. That was a mere matter of evidence before the master, to enable him to decide properly as to the matters referred to him. Nor did that release have the effect to discharge the property of the appellant from its primary liability for the payment of the one-third of the eighth of the annuity which was in controversy before the master, upon the reference. The sixteenth and seventeenth exceptions were therefore properly disallowed by the vice chancellor.

The order appealed from was not erroneous in any respect; and it must be affirmed with costs. The appellant must also pay to Anne Eliza Freeland, one of the respondents, interest on the arrears of the annuity reported due, from the date of the appeal to the 30th of June, 1848; as her damages for the delay and vexation caused by this appeal.

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Where a party enters into the possession of land, claiming under a particular title, he cannot set up an outstanding title in a stranger, as a defence to a suit, brought by the owner of the title under which he entered, to recover the possession of the premises.

But a party who has gone into possession of land as the tenant of another, and acknowledging his title, is only estopped from denying the validity of that title, and setting up a better right in himself, so long as he retains the possession; or during the continuance of the tenancy. For upon the termination of the lease and the restoration of the possession, he may sue and recover back the possession of the premises, upon showing a better title in himself.

By the common law, if a grantor who has no interest, or only a defeasible interest, in the premises granted, conveys the same with warranty, and afterwards obtains an absolute title to the property, such title immediately becomes vested in

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the grantee, or his heirs or assigns, by estoppel. And if the grantor, or any one claiming title from him subsequent to such grant, seeks to recover the premises by virtue of such after acquired title, the original grantee, or his heirs or assigns, by virtue of the warranty, which runs with the title to the land, may plead such warranty, by way of rebutter, or estoppel, as an absolute bar to the claim.

This principle has been applied to all suits brought by persons bound by the warranty, or estoppel, against the grantee or his heirs or assigns; so as to give the grantee, and those claiming under him, the same right to the premises as if the subsequently acquired title, or interest therein, had been actually vested in the grantor at the time of the original conveyance from him with warranty; where the covenant of warranty was in full force at the time when such subsequent title was acquired by the grantor.

And where an estoppel runs with the land it operates upon the title, so as actually to alter the interest in it, in the hands of the heirs or assigns of the person bound by the estoppel, as well as in the hands of such person himself.

As a covenant of warranty runs with the land, so as to give the heirs and assigns of the grantee the benefit of the estoppel as against the warrantor, it runs with the subsequently acquired interest of the warrantor, in the hands of the heirs and assigns of the latter; so as to bind that interest, by the estoppel, as against any person claiming the same under him, *in the post*.

Where parties go into possession of premises claiming title thereto under a conveyance to a particular grantee, they cannot set up an outstanding title in a stranger, to defeat a person who claims the premises under the same title as themselves, but by a prior right which overreaches their claim.

Persons entering into possession of land under the defendant in a judgment, subsequent to the issuing of an execution thereon, are bound to yield up the possession to the purchaser under such execution, unless they can show a better right in themselves, or establish the fact that the judgment was invalid, as against them.

Where the breach of the covenant of seisin in a deed affects the whole title, so that nothing passes to the grantees, a recovery by such grantees for the damage sustained by the breach of that covenant, may have the effect to prevent the operation of the estoppel created by such covenant, or even by a covenant of warranty; by creating a counter estoppel, which would prevent the grantees, or those claiming under them, from alleging that they acquired the title to the land by the original conveyance to them.

Although the grantee in a deed which contains a covenant of seisin, in connection with general covenants of warranty, and the heirs and assigns of such grantee, are not estopped by such deed from showing that the grantor had no title to the land attempted to be conveyed, the warrantor, and those claiming under him, *in the post*, are estopped, by his covenants, from alleging that he had not a perfect title to the land when he conveyed the same with warranty.

Hence a reconveyance of the land, by the grantee thereof, without covenants of warranty in such reconveyance, will not prevent such original grantee from recovering for a breach of the covenant of seisin contained in the conveyance of the premises to him.

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Where the parties have submitted themselves to the jurisdiction of the court of chancery, without objection, the chancellor will not refuse to take jurisdiction of the case, and to make a proper decree therein, merely upon the ground that the complainant had a perfect remedy by an action at law.

But where the complainant improperly and unnecessarily comes into the court of chancery for relief, and the defendant neglects to make the objection that the remedy of the complainant, if any, was at law, whereby the chancellor is compelled to take jurisdiction of the case and to decide it upon the merits, he may, in the exercise of a sound discretion, refuse to give to either party the general costs of the litigation.

The maxim that custom is the best interpreter of the law, applied to the form of a comptroller's deed given on a sale of land for taxes; where it appeared that it had been the custom to execute deeds in the same form, for more than a quarter of a century.

The expression of Lord Coke, that common opinion is good authority in law, does not apply to a mere speculative opinion in the community as to what the law upon a particular subject is. But when such opinion has been frequently acted upon, and for a great length of time, by those whose duty it is to administer the law, and important individual rights have been acquired or are dependent upon such practical construction of the law, it is entitled to great weight.

It is not necessary that a deed given by the comptroller to the purchaser of lands sold for taxes, should be technically executed in the name of the people. It is sufficient if it recites the substance of the statutes under which the sale was made, the non-payment of the taxes charged upon the land, the advertisement and sale of the premises, the payment of the purchase money by the grantee, and that the premises have not been redeemed; and purports to convey the land to the original purchaser, or his assigns, *by virtue of the authority vested in the comptroller by law*; and is executed under the comptroller's official seal, and witnessed by one of the officers mentioned in the statute.

The statute does not require a comptroller's deed to state in what year the tax was assessed, for the non-payment of which the land was sold. Hence if the deed states that the taxes have been assessed and returned to the comptroller, and have remained unpaid for two years, this is all that is necessary to show upon the face of the deed that the comptroller was authorized to make the sale.

The prima facie evidence of ownership in the grantee afforded by a comptroller's deed, is liable to be rebutted by proof that the tax, returned to the comptroller as unpaid, had actually been paid to the collector.

Such prima facie evidence may also be rebutted by showing that the land thus sold and conveyed by the comptroller, or some part of it, was actually occupied by some person at the expiration of two years from the time of the sale, or that it was so occupied at the time of the giving of the comptroller's deed; so as to throw upon the party claiming under such deed the necessity of giving to the occupant the notice to redeem which is required by the statutes on this subject.

The effect of the several statutory provisions relative to the sale of lands for taxes, is that if the land sold by the comptroller, or any part thereof, is actually

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occupied at the end of the two years from the close of the sales, the purchaser or his assignee, must serve the notice required by the act of April, 1830, upon the occupant, and file the evidence of such service with the comptroller, within the times prescribed by that act, or by the act of 1844 amending the same; or he will lose the benefit of his purchase.

Where the purchaser serves such notice and files the evidence of such service within the time prescribed, and the lands are not redeemed within the six months allowed by the act of 1830 for that purpose, his title will become perfect as soon thereafter as he shall have obtained the comptroller's deed; whether such deed shall have been given before, or after, the service of such notice.

In cases, however, where the lands sold are not occupied at the expiration of the two years, but there is an actual occupant of the land, or of any part of it, at the time of the giving of the comptroller's deed, the title of the purchaser will not become absolute, under such deed, until six months after he shall have served the occupant with the notice to redeem; and shall have obtained the comptroller's certificate that evidence of the fact of such service has been filed, and that the land was not redeemed by the payment of the redemption money into the treasury within six months after the service of such notice.

But in cases not coming within the scope of the act of April, 1830, there is no time limited by law for giving notice to the occupant of the land who was in the occupancy thereof at the time of giving the comptroller's deed. And the only effect of a neglect to give such notice is to extend the time for redemption of the land, and the perfecting of the title of the purchaser.

The fact that the occupant of the land sold is the tenant of the grantee in the comptroller's deed, will not authorize the latter to perfect his title, as against the paramount claims of others upon the land, without giving the notice to the occupant required by the statute.

If any part of the premises sold for taxes is actually occupied at the times specified in the statutes relative to the giving of notices to the occupant, the purchaser must give the prescribed notice to the occupant of such part of the premises, and obtain the comptroller's certificate that such notice was given and that the premises were not redeemed within the time prescribed; before he can complete his title to any part of the premises included in the purchase.

If the lands described in the comptroller's deed cannot be located, for want of a proper description of the tract out of which the lands sold were to be taken, the sale is invalid.

A release of the personal liability of one of several defendants, on a judgment in favor of the releasor, executed in pursuance of the provisions of the act of April, 1838, for the relief of partners and joint debtors, but which release leaves the judgment, and the debt for which it was recovered, in full force against the other defendants, will not render the defendant thus released a competent witness for the plaintiff in such judgment.

To restore the competency of such witness, if he is incompetent in consequence of any contingent liability, for the judgment debt, depending upon the event of the suit in which he is called as a witness, the plaintiff should not only release him but also the other judgment debtors from such contingent liability.

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Where it only appears from the examination of the witness himself that he is interested in favor of the party calling him, or that he is otherwise incompetent, the objection to his competency may be removed in the same manner that it was created. And the witness may be examined by the party calling him, to show that his interest has been removed by a release, or to prove any other fact to establish his competency at the time of his examination.

But where the witness' interest, or other incompetency, appears *abunde*, the witness cannot be examined for the purpose of showing his competency; by testifying to the execution of a release, or to any other fact.

After the proofs in a cause have been closed, *ex parte* affidavits cannot be received for the purpose of proving that a release of a witness' interest was executed and delivered to the witness previous to his being examined.

Where a release of the interest of a witness, produced at the hearing, is neither dated nor witnessed, the acknowledgment by the party executing it is only evidence that he had executed it at or before such acknowledgment; not that it was executed previous to the examination of the witness, where such examination was before the date of such acknowledgment.

The lands of a judgment debtor were not liable to be sold on execution, by the English common law; but by the statutes of extents and elegits they were set off to the judgment creditor until his debt should be paid.

The statute of 32 Hen. 8, chap. 5, giving a remedy to the creditor to whom the debtor's land had been delivered in extent, upon elegit, where the tenant by elegit was afterwards evicted out of or from the possession of, such land, being a part of the general law of England at the time of the first settlement of New-York under the charter to the Duke of York, it became a part of the common law of the colonists; in connection with the principles of the statutes of extents and executions then existing in England. But when the statute of 5 Geo. 2, chap. 5, subjected real estate in the colonies to sale upon execution, in the same manner as personal property, the writ of elegit was virtually abolished here.

The equitable principle of the statute of 32 Hen. 8, chap. 5, however, still applied to the case of a creditor who had purchased the real estate of his debtor, upon execution. And it continued to be a part of the law of the colony; though the particular form in which the relief had been given was no longer strictly applicable to the sale under an execution. The court of chancery, therefore, has jurisdiction to act upon the equitable principle of the English statute, by giving relief to the purchaser at a sale of lands upon execution, for an eviction, or failure of title; upon an application to the equitable powers of that court.

Where the plaintiff in a judgment is himself the purchaser, and has been evicted for want of title in the judgment debtor, his remedy still depends upon the equitable principle of the colonial law, derived originally from the statute of Hen. 8, as applied to sales of land upon execution; which equitable principle has been applied, by analogy, to sales of personal property, &c. where the plaintiff became the purchaser and was subsequently deprived of the benefit of his purchase for want of title in the judgment debtor.

Where the common law does not provide for such cases, they are proper subjects

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for the interference of the court of chancery; or for relief upon a summary application to the equitable power of the court out of which the execution issued.

This equitable principle applies to a case where a judgment creditor purchased premises at a sale thereof by the sheriff, under the judgment, in the belief that the title was in the judgment debtors, or one of them, at the time of the docketing of the judgment; and where the judgment debtors, in a statement of their property, furnished to the judgment creditor, and others, previous to such sale, had represented that they were the owners of the lands subsequently sold and bid off by the judgment creditor.

In the court of chancery, where many issues frequently are combined in one suit, a witness is not to be rejected altogether because he is interested as to one part of the case, when as to another part of the case he has no interest whatever. He may be examined as a witness to that part of the case in which he has no interest; or in which his interest is adverse to the party calling him.

The true principle, in reference to privileged communications between attorney and client, is that where the attorney is professionally employed, any communication made to him, by his client, with reference to the object or the subject of such employment, is under the seal of professional confidence, and is entitled to protection as a privileged communication.

This seal of professional confidence is not the seal of the attorney, but of his client, which the attorney is by law as well as by professional honor bound to keep intact; and it cannot be removed except by the consent of the client.

The seal which the law once fixes upon such communications remains forever, unless removed by the party himself in whose favor it was there placed.

And where the privilege belongs to several clients, *it seems* that neither one of them, nor even a majority, contrary to the expressed will of the others, can waive the privilege, so as legally to justify the attorney in giving testimony in relation to such privileged communications; especially in a case where the testimony of the attorney equally affects the moral characters of all his clients, by showing that they employed him professionally to assist them in giving a fictitious judgment for the purpose of defrauding their creditors.

Nor will the fact that the client, whose assent to the removal of the seal of professional confidence from privileged communications has not been obtained, is not a party to the suit in which his attorney is called upon to testify, alter the case.

Neither will the fact that an attorney was a subscribing witness, to a warrant of attorney prepared by him for his clients to execute, alter the question as to the admissibility of his evidence tending to the conclusion that the object of giving the warrant of attorney, and having judgment entered thereon, was to hinder and delay their creditors in the collection of their debts; and that the judgment was given for a much larger sum than was justly due to the judgment creditor.

But an attorney who is professionally employed to prepare a deed for his client, and who afterwards witnesses its execution, may be compelled not only to prove the execution of such deed, but also to testify whether it was ante-dated;

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whether it was in the same form in which it now appears, at the time of its execution, or has been altered; and whether it was actually delivered at the time he subscribed his name thereto as a witness.

And if the deed has been lost, or is in the hands of the adverse party, who refuses to produce it upon the trial, or for the purposes of the suit, the attorney who witnessed the deed may be compelled to testify as to the contents thereof; although in the preparation of such deed he was professionally employed.

It seems the seal of professional confidence has never been held to cover a communication made to an attorney to obtain professional advice or assistance as to the commission of a felony, or other crime which is *malum in se*.

But the fact that an attorney was employed by his clients to assist them in a transaction which, from what was said in his presence, he must have known to be a fraud upon their creditors, will not deprive their communications of the seal of professional confidence.

The privileged relation of attorney and client, however, ought only to be permitted to exist for honest purposes, and not to enable the client to perpetrate a fraud, or to violate the laws under the advice of counsel, or through any other professional aid. But the law appears to be settled otherwise.

THIS case came before the chancellor upon appeal from a decree of the vice chancellor of the eighth circuit.

At the time of the death of Harmanus Garretson, in 1813, he and Gosen Ryers were the owners, as tenants in common in equal shares, of the north half of township No. 1, in the second range of townships in the county of Steuben, containing about 11,500 acres of land; excepting out of the same 600 acres which they had previously conveyed. H. Garretson by his will authorized and directed his executors, J. Garretson, J. Guyon and P. I. Van Pelt, to sell his interest in this tract of land, and to pay one half of the proceeds of the sale to his son John, and the other half to his two daughters, Dinah Mersereau and Margaret Guyon. In 1814, the executors sold and conveyed the undivided half of the premises of which their testator died seised, to Joshua Mersereau, jun.; and took back a bond and a mortgage upon the premises to secure the payment of \$4777,50, of the purchase money. The purchaser went into possession of the premises, with his family, the succeeding winter, and contracted to sell some parts thereof.

In October, 1817, W. Smith recovered a judgment against Joshua Mersereau, jun. which became a lien upon the interest of the latter in the premises. And in January thereafter G. R.



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De Hart who had become entitled to an undivided interest, as tenant in common, in the other half of the premises, commenced a suit for the partition of the whole premises; proceeding against the owners of the half of which H. Garretson died seised, as owners whose names were unknown to him. J. Mersereau, jun. not being able to pay the amount due upon his bond and mortgage, entered into an agreement with them for a reconveyance of the premises and a cancelment of his mortgage. And on the 9th of February, 1818, he conveyed his undivided half of the premises to J. Garretson, J. Guyon, and Peter I. Van Pelt, describing them as executors of the last will and testament of H. Garretson deceased; with covenants of warranty and seisin and for further assurance. The mortgage which had been given to the executors for the purchase money upon the original sale was thereupon given up and cancelled.

On the 28th of February, in the same year, the sheriff of Steuben county sold the undivided half of the premises, by virtue of an execution issued upon Smith's judgment against J. Mersereau, jun. to E. Lindsley; and in March, 1818, he conveyed the same to the purchaser at such sale. The commissioners, appointed in the partition suit, assigned as the share of the unknown owners in the premises 5450 acres on the west side of the Tioga river, being the whole of the premises on that side of the river, except a lot of 292 acres set off in the partition to Joseph W. Ryers, and a small lot containing one acre and a half assigned to G. R. De Hart. And judgment thereon was given in September, 1818, and the land set off as the share of the unknown owners was charged with one half of the costs of the partition. The sheriff, by virtue of an execution issued upon the last mentioned judgment, sold and conveyed to E. Lindsley 1000 acres of the land assigned to the unknown owners, adjoining the south bounds of the said lands. In September, 1819, Lindsley and wife conveyed to Dinah Mersereau 546 acres of the premises set off to the unknown owners in the partition, south and adjoining the 292 acre lot assigned to J. W. Ryers, as one of the heirs of John P. Ryers, in the partition

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suit; and extending west from the Tioga river to the westerly bounds of the tract assigned in the partition suit to the unknown owners. At the same time they conveyed to her 35 acres in the southeast corner of the 1000 acres sold by the sheriff for the costs of the partition suit, bounded north by B. Harrower's land, which had been previously sold to him by Lindsley, and west by J. Hemstead's land, and east by the Tioga river. The Harrower lot was 211 acres lying some where between the two pieces conveyed to Dinah Mersereau, bounded on the Tioga river and extending west a little farther than the west line of the 292 acres set off to Ryers in the partition. The conveyance by Lindsley to Dinah Mersereau, was made under an arrangement with her son, Joshua Mersereau, jun., by which she was to receive this portion of the premises in satisfaction of her one-fourth of the proceeds of the sale of the land, under the will of her father; and the same was allowed to Joshua Mersereau, jun. by the executors, in the subsequent settlement with him. In December, 1819, an arrangement was made between Lindsley, and Joshua Mersereau, jun. and John Garretson, who professed to act in behalf of himself and his co-executors, by which Mersereau was to pay Lindsley for his interest in the lands, under the sheriff's deed, and to receive a conveyance of such parts of the land as had not been previously conveyed by Lindsley. And he was to pay to the executors the amount due upon his original purchase, after deducting therefrom the one-fourth, that by the will of his grandfather belonged to Dinah Mersereau, his mother; to satisfy which one-fourth he had procured a conveyance to be made, to her, of the 581 acres embraced in the deed of Lindsley and wife to her in September, 1819. A part of this balance the executors were to receive in the bonds and mortgages of the purchasers of different portions of the premises, that were to be conveyed to Mersereau by Lindsley and wife; and the residue was to be secured by Mersereau's bond and mortgage upon about 3000 acres of the same premises.

In pursuance of this arrangement, Lindsley and wife, on the 15th of December, 1819, conveyed to Mersereau the whole of

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the premises set off to the unknown owners in the partition suit, except the 581 acres embraced in the deed to his mother, and the 211 acres which Lindsley and wife had previously conveyed to B. Harrower. On the 16th of the same month, Mersereau and wife gave a bond and mortgage to J. Garretson and, his co-executors, upon about 3000 acres of the same premises; conditioned for the payment of \$1700, in five yearly payments, commencing on the first of July, 1822, with annual interest from the date of such bond and mortgage. Mersereau also conveyed several parcels of the premises, not embraced in this mortgage to the executors, and took back from the purchasers bonds and mortgages upon the lands thus conveyed to them; which J. Garretson received, for the executors, in payment of the balance of their claim against Mersereau that was not covered by the \$1700 bond and mortgage. And Mersereau having requested that the executors would give him some evidence that he was entitled to the lands which were not covered by their \$1700 mortgage, J. Garretson gave to him a certificate that he and his co-executors held no other lien upon the premises except the mortgage of Mersereau, to them, of the 16th of December, 1819. Mersereau continued to reside on and to exercise acts of ownership over the lands conveyed to him by Lindsley and wife, until the spring of 1821; when he went to Pennsylvania to reside, and left the cultivated parts of the premises, not previously sold by him, in the possession of his tenants. He died in the autumn of 1821, very much embarrassed and leaving some judgments against him, which were liens upon his interest in the premises. His only child and heir Jane Maria, who afterwards married T. R. Budd before the termination of her minority, was then an infant between seven and eight years of age; and upon the death of her father, some of her relatives assumed to rent the cultivated portions of the premises in question. In the fall of 1822, the first instalment of principal upon the \$1700 mortgage having become due, J. Garretson requested B. Harrower to take charge of the premises, and rent the cultivated parts thereof to keep down the taxes on the whole premises, and he rented the same accordingly.

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The executors also bought up a judgment of \$433, which C. Strong had recovered against Mersereau in his lifetime, and which was a lien upon his interest in the premises.

On the 20th of January, 1831, John G. Mersereau who was the assignee and owner of a judgment of about \$300 against Joshua Mersereau, jun. and the assignee and owner of the half of two other judgments against him, for upwards of \$1200, made an agreement with the executors of H. Garretson, to purchase of them the Strong judgment, and the \$1700 mortgage, and the several mortgages which remained unpaid, given by the purchasers of different portions of the premises included in the sheriff's deed to Lindsley, which had been taken by the executors in their compromise with Joshua Mersereau, jun. in December, 1819. The mortgages and judgments were assigned to him accordingly. On the same 20th of January, 1831, J. Garretson and P. I. Van Pelt, the two surviving executors of H. Garretson and H. Guyon; who is described in the deed as the executor of J. Guyon the deceased executor, released and quit-claimed to John G. Mersereau, all the lands set off to the unknown owners in the partition suit, except the two Pier lots of 100 acres each in the northwest corner of the tract, which were not included in the \$1700 mortgage; and also excepting from the lands embraced in the boundaries of the deed the land conveyed by John Garretson to Cyrus Strong, the lands of B. Harrower and of Dinah Mersereau; and also the lands of W. French, W. Chilson, A. Butler, D. Butler and J. Upham, as the same were described in their several mortgages.

Soon after the execution of this deed, the agent of John G. Mersereau contracted to sell 1000 acres off of the north end of the premises described therein, to M. Lewis, and two other persons of the same name; and they moved on to the premises, and improved parts thereof and exercised acts of ownership over the rest of it for three or four years; when they abandoned their contract and left the premises. In September, 1831, John G. Mersereau took possession of other parts of the premises described in the quit-claim deed to him; and exercised acts of ownership over the same beyond the boundaries of

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the 3000 acres included in the \$1700 mortgage to the executors. He built a dwelling house, barn and saw-mill thereon, and moved into the house with his family; contracted for the sale of several parcels of the premises in fee, and executed conveyances to the purchasers of some of those parcels; and claimed to be the owner of the premises so far as the same remained unsold. In the spring of 1832 he entered into an agreement with Chan-  
cey Hoffman and James G. Mersereau to go into copartnership in the lumbering business, &c; and he was to convey to each of them an undivided one-third of the unsold portion of the premises embraced in the quit-claim deed of the executors to him, north of the Helmer or Dinah Mersereau lot, and south of the 1000 acres contracted to be sold to the Lewises; and they were to pay equal proportions with him of the \$3200 which he had agreed to pay to the executors of H. Garretson. And the summer following their partnership business commenced in lumbering and farming and merchandising; which partnership was to be continued for three years. They also purchased the two Pier lots of 100 acres each, lying north of the 1000 acres contracted to the Lewises; which Pier lots were not embraced in the quit-claim deed given to John G. Mersereau in January, 1831. Hoffman moved on to the Pier lots, and James G. Mersereau on to the premises which were to be held by the three partners in common. They built a store and a saw-mill and made other valuable improvements upon the premises, and carried on an extensive business in lumbering, farming and merchandise during the three years which the partnership was to be continued by their agreement. In the prosecution of this business, the copartners became indebted to the complainants, and to the Steuben County Bank, and to the Chemung Canal Bank, in large sums of money, and ultimately became insolvent. In the spring of 1833, the copartners, who transacted the business of the firm under the name of Hoffman & Mersereau, rafted and sent to Port Deposit, in the state of Maryland, a large quantity of lumber. And in conjunction with N. Pearsall they purchased a large quantity of lumber at the last mentioned place, of the value of about \$28,000; which was equally divided

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between Pearsall and the firm of Hoffman & Mersereau. In September, 1833, Hoffman entered into a copartnership with G. Love and J. S. Pickering of Philadelphia, in the business of buying and selling lumber, under the copartnership name of Love, Pickering & Co., and Pearsall sold to that firm his part of the lumber purchased by him in connection with the firm of Hoffman & Mersereau, at Port Deposit, the summer previous, and received therefor the notes of Love, Pickering & Co. to the amount of \$13,000, payable at different times, which notes were endorsed by Pearsall and afterwards came into the hands of H. McEldery, and two of them were paid when they became due. Pickering and Love shortly afterwards became insolvent.

In the spring of 1834, Hoffman & Mersereau obtained, by manufacture and purchase, other large quantities of lumber, consisting of about a million and a half feet of joist, plank and boards, and two hundred and eighty thousands of shingles; which lumber was rafted and sent down the Susquehannah for Port Deposit. And in June of that year a large amount of paper which had been discounted by the Steuben County and Chemung Canal banks respectively, for Hoffman & Mersereau, had fallen due and was unpaid. The firm was pressed by the claims of other creditors, and its credit was very much questioned. Hoffman made out a statement of the debts and liabilities of the firm, and of its property and effects, from which it appeared that Hoffman & Mersereau owed to the Bank of Utica about \$17,000, to the Steuben County Bank \$14,000, to the Chemung Canal Bank \$10,500; and to other creditors about \$17,325, including the amount of several mortgages upon the real estate of the firm. This statement, a copy of which was sent to each of the three banks, also showed that the estimated value of the property of Hoffman & Mersereau, including 4100 acres of the land embraced by the quit-claim deed of Garretson and others, and the two Pier lots, and the mills and other improvements on the premises, and about \$50,000 worth of lumber at Port Deposit and in rafts on their way to that place, was nearly double the amount of the debts of the firm. Soon after this statement was furnished, an arrangement was

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maue between the several cashiers of these three creditor banks, by which Magee was sent to Philadelphia, as the agent of the several banks, to see Hoffman, who was then there, and to induce him and the other members of the firm of Hoffman & Mersereau to make such a disposition of their property in Pennsylvania, and at Port Deposit, as would secure the proceeds of it for the benefit of the three banks. Upon the arrival of Magee at Philadelphia, Hoffman declined making any arrangement for the security of his New-York creditors, and he ultimately refused to assign the property of the firm in Pennsylvania, and at Port Deposit in Maryland, for the benefit of the three banks. But after a good deal of negotiation he finally consented and agreed that the firm should mortgage the lumber at Port Deposit to the Bank of Utica to secure the debt due to that institution, and should reduce the debt of the Steuben County Bank to the same amount as that of the Chemung Canal Bank, and give a mortgage upon the lands of the firm in Steuben county to the two last named banks to secure the remainder of their indebtedness to those banks. Information of this arrangement was communicated by letter to the cashier of the Bank of Utica, and personally to the cashier of the Chemung Canal Bank. In conformity with this arrangement J. C. Groom, an attorney at Elkton, in Maryland, was employed to draw a chattel mortgage, to the Bank of Utica, of all the lumber of the firm at Port Deposit, and in the Susquehannah canal, in the state of Maryland, to secure the payment of the several notes and drafts upon which they were liable to that bank, amounting in the aggregate to \$17,500, and the interest thereon; in conformity to the requirements of the laws of Maryland on that subject. He prepared a chattel mortgage accordingly, on the 2d of August, 1834; conditioned for the payment of the amount of the said notes and drafts on or before the first of December thereafter. This mortgage was executed and duly acknowledged by Hoffman and James G. Mersereau, the same day, and delivered by them to Groom for the benefit of the mortgagee. He caused the same to be recorded, as required by the laws of Maryland, on the 4th of August, 1834, and sent

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a copy thereof to Hoffman ; who immediately transmitted the same by mail to the Bank of Utica, and requested copies of the several notes and drafts referred to and secured by the mortgage to be transmitted to Groom. On the 13th of the same month the cashier of the bank enclosed such copies to Groom accordingly and sent the same by mail ; accompanied by a short note to Hoffman, stating that the bank would be governed by his wishes in relation to appointing the agent.

Soon after the execution of the mortgage, James G. Mersereau left Port Deposit and returned to Steuben county, leaving the lumber in the care of D. Chamberlin and D. K. Fitch, under the direction of Hoffman, who assumed the control of it, professing to act as the agent of the Bank of Utica. A part of the lumber was sent to Philadelphia and put into a lumber yard at that place, under the care of Hoffman, for sale. In the fore part of September, 1834, Hunt, the cashier of the Bank of Utica, having private business at Philadelphia, called to see Hoffman, and to converse with him on his affairs with the bank. But finding he was absent from the city, Hunt, upon his return to New-York, on Saturday evening, the 13th of September, wrote to Hoffman in reference to the call at Philadelphia, as follows: "I simply called to consult upon your best interests. I have nothing to ask. You have done all that an honorable man can do—more than I asked—I am satisfied. The whole story is told in a sentence—markets are bad ; you have gone too largely, and time must be given to wait the markets, even for a year, rather than ruin honest men who can if treated kindly pay forty shillings on the pound. The only apprehension I had was that some of your small creditors, being very greedy, might commence suits, and obtain judgments in October, and thus embarrass you. This ought to be prevented, because equal and exact justice should be done to all. In case you feared any result of this kind, I had intended to have suggested that in order to defend yourself against the assaults of those who want more than their own, you might *give the bank a judgment*, and the bank will give you the complete control of it in your own hands. I don't want it for our



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security. I am satisfied to rest it upon your own honor. I always was satisfied. I also wanted, if I could have seen you in Philadelphia, to have executed a formal power of attorney, constituting you the agent to sell, and receive the avails of, all property assigned to the bank. But Mr. Love it seems would not see me. Now what I would say is that, as I am here on a jaunt of pleasure, I will wait to see you here or in Philadelphia as you please; and I know we can arrange all things for the advantage of those who now will have sound confidence in each other." This letter was post marked at New-York, on the 14th of September, and was addressed to "Chancey Hoffman, Esq., care of Giles Love, Philadelphia." But when it was received by Hoffman, who returned to his residence in Steuben county, about that time, did not appear. Upon the return of Hoffman to Steuben county he was very reluctant to consummate the agreement made with Magee, at Philadelphia, to secure the debts due by Hoffman & Mersereau to the Chemung Canal Bank, and the Steuben County Bank, by mortgage upon the lands of the firm in Steuben county. But by arrangement a meeting was agreed to be held between the members of the firm and a committee on the part of each of those banks, to decide what should be done relative to giving such security. A meeting was held accordingly at Painted Post on the 17th or 18th of September, 1834, at which Hoffman and James G. Mersereau agreed to give the mortgages, as soon as John G. Mersereau and his wife, who were temporarily absent, should return. Soon after this meeting the members of the firm of Hoffman & Mersereau agreed among themselves to give a judgment to the Bank of Utica, which should be entered up secretly, after the agents of the other banks had made their searches for incumbrances preparatory to the taking of their mortgages, so as to give the judgment a preference over those mortgages; and that such judgment should be given for a larger amount than was due from them to the Bank of Utica; as the defendants insisted their proofs in the cause showed. Hoffman & Mersereau employed H. G. Cotton of the firm of Cotton & Johnson, attorneys at Painted Post, to draw the bond

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and warrant and enter up the judgment in favor of the Bank of Utica. The bond and warrant were drawn by him accordingly; and were executed by Hoffman and the two Mersereaus, on the 20th of September, 1834. The bond was in the penalty of \$45,000, and was conditioned for the payment of \$22,746.22, with interest; and the warrant of attorney, to which Cotton was the subscribing witness, authorized the entry of a judgment upon the bond for the amount thereof. The judgment was entered up in the name of Johnson as the plaintiffs' attorney; and Cotton his copartner, who prepared the papers for the defendants therein, signed the cognovit as their attorney on the record. The papers were completed with the exception of signing the record and taxing the costs, and were delivered to Hoffman, under cover to the agent of Cotton & Johnson at Utica, to have the judgment perfected. Hoffman took the papers to the Bank of Utica; where under the direction of its officers a statement was appended to the judgment record and other papers, purporting to be a correct detail of the amount of the several notes, drafts and acceptances then held by the bank, and for the payment of which Hoffman & Mersereau were then liable, amounting in the aggregate to \$26,712; which statement Hoffman certified to be correct. The record and statement, and the bond and warrant and other papers, were then delivered to the law agent of Cotton & Johnson, to be signed and filed, on the 10th of October, 1834. And he caused the entry of the judgment to be perfected accordingly, on the same day. The Bank of Utica at the same time discounted for Hoffman two notes of \$1250 each, drawn by him and endorsed by John G. Mersereau and James G. Mersereau, dated on the 10th of October, 1834, payable at three and four months; upon which notes, in October, 1836, they recovered a judgment against the drawer and endorsers.

On the 3d of November, 1834, the arrangement for the giving of the mortgage to the Steuben County Bank was consummated; at which time, for the purpose of defrauding this bank and inducing its officers to give time to Hoffman & Mersereau for the payment of the debt due from that firm to the bank,

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C. Hoffman, in the presence of his copartners, and without any dissent from them, falsely represented to the officers and agents of the bank that there were no incumbrances upon the premises which they were about to mortgage to such bank; except two small mortgages specified, and some small judgments which were secured by a levy upon personal property. The Steuben County Bank thereupon received from Hoffman and the two Mersereaus their bond for \$12,000 of the debt, payable in four yearly payments, commencing in July, 1836, with annual interest, and their note for the balance of the debt; which bond for the \$12,000 was secured by their mortgage of the 2d of December, 1832, upon the undivided half of about 3500 acres of the premises set off to the unknown owners in the partition suit, in two separate parcels; the first of which parcels was bounded on the north and west by the township lines, on the south by the Helmer or Dinah Mersereau lot, and the Marks lot, and on the east by the Tioga River and a line running south two degrees and thirty minutes west from the northwest corner of the Marks lot to the north line of the Helmer or Dinah Mersereau lot, excepting out of the same the small pieces of land described as the A. C. Smith lot, the Morris Johnson lot, and the school house lot. And the second parcel of the mortgaged premises consisted of lots Nos. 17, 18 and 19, situated in the southwest corner of the premises set off to the unknown owners in the partition suit, bounded on the north by the Helmer, or Dinah Mersereau lot, and extending east to lots No. 13 and 14. On the 23d of December, 1834, Hoffman and the Mersereaus gave a bond and mortgage to the Chemung Canal Bank on the other undivided half of the same premises, to secure the payment of \$10,422.93 due to that institution.

On the 17th of October, 1834, the lumber mortgaged to the Bank of Utica was attached by the sheriff of Cecil county, in Maryland, in a suit of H. McEldery against G. Love, J. S. Pickering and C. Hoffman, as the copartners composing the firm of Love, Pickering and Company. The lumber remained in the custody of the sheriff until April, 1835, when the attachment was discharged or the property released from the operation

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thereof, by order of the court; and it was subsequently sold or disposed of by Hoffman, and others under him, who professed to act as the agent of the Utica Bank in relation to such lumber. But there was no proof in this case that any part of the proceeds of the lumber was applied by him to the payment of the debts due from the firm of Hoffman & Mersereau to that bank. In December, 1835, Hoffman & Mersereau having failed to pay their note, to the Steuben County Bank, which was given for the balance of the debt beyond the \$12,000 mortgage, a judgment was confessed to that bank for the amount. And in the spring of 1836, they being then insolvent, and execution being about to be issued against them which might reach their personal property, the Bank of Utica caused an execution to be issued upon its judgment and to be levied upon the personal property of the defendants in the county of Steuben; in which execution the sheriff was directed to levy the whole amount mentioned in the condition of the bond upon which the judgment was entered, and the costs. The sheriff raised from the sale of the personal property about \$2000.

On the 28th of July, 1836, John G. Mersereau and James Mersereau, who were in possession of the premises mortgaged to the Steuben County Bank and the Chemung Canal Bank, except the part embraced in the Pier lots, upon which Hoffman resided, surrendered the possession thereof to those banks as the mortgagees thereof. And the banks thereupon furnished teams, carriages, &c. and employed the Mersereaus to carry on the business of lumbering and farming upon the premises, as the agents of those banks, until November, 1837. On the first of November, 1837, the two lots of 100 acres each, called the Pier lots, were sold by a master in chancery, under a decree for the foreclosure of a mortgage given by John G. Mersereau to Ethan Pier, and assigned to W. Wambaugh, and were purchased by Wambaugh and conveyed to him by the master on that day; and Hoffman thereupon attorned to Wambaugh and became his tenant.

On the 7th of September, 1837, the Steuben County Bank having ascertained that the equity of redemption of Joshua

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Mersereau, jun. in the 3000 acres mortgaged by him to the executors of H. Garretson had not been foreclosed, obtained a quit-claim deed from Budd and his wife, of the interest in the mortgaged premises to which she was entitled as the sole heir-ess of her father, subject to such rights as the grantees in that deed had acquired under their mortgages from Hoffman & Mersereau. On the 4th of November, 1837, the two defendant banks leased the premises which had been mortgaged to them by Hoffman & Mersereau to T. L. Mersereau for one year, at a rent of \$600. And he thereupon entered into the possession of the premises thus leased, except the two Pier lots, which had been previously sold to Wambaugh at the master's sale, and which Hoffman then occupied as his tenant. T. L. Mersereau continued in possession as the tenant of the Steuben County and the Chemung Canal banks until after this suit was commenced. Six days after the execution of that lease, the sheriff of Steuben county, by virtue of the execution upon the large judgment of the Bank of Utica, sold at public auction all the right and title of the defendants in that judgment, to the premises embraced within the boundaries of the two mortgages given by them to the Steuben County and Chemung Canal banks, including the Smith lot and the Johnson lot and the school house lot, which were excepted by such mortgages; and also about 118 acres of land on the east side of the Tioga river. The premises thus sold were struck off to the Bank of Utica, and on the 19th of April, 1839, were conveyed by the sheriff, to the purchaser, in the usual form.

At a comptroller's sale for taxes in April and May, 1830, there was sold 800 acres of land, to be laid out in a square form, as nearly as might be, in the northwest corner of 2401 acres in township No. 1, assessed to John Garretson, and described in such assessment as being bounded on the south by Joshua Mersereau and others, west by the town line, north by Rathbone and the town line, and east by the Tioga river and Ryers and others. The 800 acres thus sold not having been redeemed within two years after the sale, and the Steuben County Bank having become the owner of the comptroller's

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certificate of sale, by assignment thereof, the 800 acres were conveyed to that bank on the 2d. of December, 1837, by the deed of the comptroller, under the seal of his office, in the usual form of deeds given by him upon the sale of lands for taxes, and attested and witnessed by the deputy comptroller. In May, 1838, the agent of the Bank of Utica offered to redeem the lands thus conveyed by the comptroller, and tendered a sum sufficient for that purpose if the right to redeem then existed. And on the 6th of December, 1837, John G. Mersereau, in payment or security of part of the indebtedness of Hoffman & Mersereau to the Steuben County Bank, assigned to that institution the \$1700 bond and mortgage which had been assigned to him by the surviving executors of H. Garretson in January, 1831.

The complainant filed the bill in this cause, in November, 1839, against The Steuben County Bank, The Chemung Canal Bank, and John G. and James G. Mersereau, to obtain possession of the premises described in the sheriff's deed to the Utica Bank, and to set aside the several deeds, assignments and transfers of John G. Mersereau, and of Budd and wife, and of the comptroller to the Steuben County Bank, and the surrender of the possession of the premises made to the defendant banks by John G. and James G. Mersereau, or for a decree declaring such conveyances, assignments and transfers to be held in trust for the use and benefit of the complainant, or for such other and further relief as should be proper, upon the case made by the bill. An answer on oath being waived, the defendants put in their joint and several answer, without oath, admitting most of the facts charged in the bill, but denying that John G. Mersereau or Hoffman & Mersereau, or any of the members of that firm were the owners of the premises on the west side of the Tioga river described in the sheriff's deed to the complainant at the time of the docketing of the judgment against Hoffman & Mersereau on the 10th of October, 1834, or at any other time; and charging, among other things, that the judgment confessed by them to the complainant, under which the premises were sold by the sheriff in 1837, was given for a much larger sum than was actually due from Hoffman & Mersereau to the com-

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plainant, and for the fraudulent purpose of delaying and injuring the Steuben County Bank and the Chemung Canal Bank, and other creditors of Hoffman & Mersereau in the collection of their debts.

A replication having been filed to the answer, a large mass of evidence was produced in the cause; the testimony of one witness, exclusive of the exhibits referred to therein, amounting to more than 3000 folios. Among other witnesses produced and examined on the part of the defendants, they called and examined H. G. Cotton, the attorney employed by Hoffman & Mersereau to draw the bond and warrant and to enter the judgment against them in favor of the complainant, to prove that the judgment was fraudulent. His testimony was objected to by the complainant's counsel, but was received by the examiner. Chancey Hoffman was called and examined as a witness for the complainant, although objected to by the defendants as interested in favor of the party calling him. The cause was heard by the vice chancellor of the eighth circuit upon pleadings and proofs. And the complainant moved to suppress the deposition of Cotton, and the defendants made a like motion as to the deposition of Hoffman. A similar motion was made on the part of the defendants to suppress the deposition of W. G. Wells, another of the complainant's witnesses.

The vice chancellor ordered and decreed that the deposition of Hoffman should be suppressed, with costs; and that the applications to suppress the depositions of the other two witnesses respectively be denied, with costs. He further declared and decreed that the complainant had acquired a title to the two parcels of land described in the sheriff's deed to the complainant on the west side of the Tioga river, except as to the two Pier lots, the Smith lot, the Johnson lot, the school house lot, and a small lot claimed by R. Marks. And that the title and claims to the said lands set up by the defendants, or any of them, were invalid as against the title of the complainant acquired by the sheriff's deed. He further declared and decreed that the complainant was entitled to the possession of the said lands; and that the defendants or any person or persons who

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had come into possession under them since the commencement of this suit deliver up possession thereof to the complainant; and without costs to the complainant, except the costs of the motion to suppress the deposition of Wells. The complainant appealed from the part of the order and decree which suppressed the deposition of Hoffman with costs; the part which denied the motion to suppress Cotton's deposition with costs; and the part which denied to the complainant the costs of the suit. And the defendants appealed from all the residue of the order and decree, except that part thereof which denied their application to suppress the deposition of Wells, with costs to be paid by them.

*E. A. Graham & C. P. Kirkland*, for the complainant. I. Hoffman was a competent witness. He was not interested; or if interested, he was duly released. II. The testimony of Cotton was inadmissible. III. The plaintiffs' judgment was bona fide. It was for a just and lawful debt; and for an amount less than was then due from Hoffman & Mersereau to the plaintiffs. It was for a lawful object, viz. the security of the plaintiffs' debt. IV. The judgment was unsatisfied at the time of the sheriff's sale of the premises in question to the plaintiffs. There is no pretence of payment except by means of the lumber mortgage. This mortgage was never accepted by the plaintiffs; no agent was ever appointed by them to receive the property or act for them in its disposition, and none of the property ever came into their possession. The mortgage being executed by Hoffman and James G. Mersereau only, conveyed no title to the property. The plaintiffs could only be responsible for such sum as they actually received on this mortgage; and there is no proof that they ever received any thing; but the contrary is proved. It was a mere collateral security. If the plaintiffs are to be deemed responsible for the whole amount of this mortgage, and bound to apply the whole of it on their debt, still there would have been a large balance due on their judgment at the time of the sheriff's sale, and therefore the validity of that sale was in no manner affected by the existence of that mortgage. V. There is no ground for



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the allegation that the plaintiffs' judgment should equitably be postponed to the defendants' mortgages. There is nothing in the facts of the case to justify such a proposition. No special agreement to found such a proposition upon is set up in the answer or established by the proofs. No such ground is set up in the answer. VI. The proceedings on the part of the plaintiffs subsequent to the judgment, viz. the execution, sale and sheriff's deed to the plaintiffs, were all regular, and vested in them all the rights and title to the premises in question which any of the judgment defendants had on the day of the docketing of the judgment, viz. the tenth of October, 1834; and any lien or title acquired under the judgment defendants, or any of them, subsequent to that day, is subordinate to the plaintiffs' deed. VII. Therefore, as against the mortgages to the Steuben County and Chemung Canal banks, the plaintiffs have a clear and perfect title, inasmuch as those mortgages were subsequent to the plaintiffs' judgment; and so far as the defendants rely or are driven to rely on their mortgages, they fail in showing any defence whatever. VIII. As to about 849 acres of the premises (viz. the 349 acre parcel testified to by Thorp, and the three lots marked on the plaintiffs' exhibit No. 1, as lots Nos. 17, 18, 19,) the defendants (the two banks) show no claim or title whatever except through and under the mortgages executed to them by Hoffman and John G. and James G. Mersereau. As to these 849 acres the plaintiffs' right is therefore clear on this ground. But they also establish their title to these 849 acres, on grounds mentioned in the next point. IX. As to the remainder of the premises (as to which the defendants, the Steuben County Bank, set up title under their deed from Budd and wife) the plaintiffs have a perfect legal title; and the Steuben County Bank obtained no title by the Budd deed. The warranty deed from Joshua Mersereau, jun. to John Garretson and others in February, 1818, vested in said Garretson and others all the title which Joshua then had, or which he subsequently acquired by the conveyance to him by Lindsley. The warranty operated to vest the title by estoppel. The covenants in this deed of Joshua were in full force at the time

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Lindsley conveyed to him, and were never released or discharged. His grantees acted on the strength and faith of the title thus vested in them, and they in no manner parted with or lost it, till they conveyed to John G. Mersereau. The title thus vested in John Garretson and others was conveyed by them to John G. Mersereau by their deed to him of 1831, and was vested in the plaintiffs by the sheriff's sale and conveyance to them. Consequently no title was acquired by Jane Maria, by descent from her father, on his death in 1821, and no title was vested in the Steuben County Bank by her deed to them. The question between the plaintiffs and defendants here is one of mere legal preference, and if the defendants have failed in showing title under the Budd deed they fail in establishing any defence to the plaintiffs' bill. None of the facts or circumstances set up or proved by the defendants with the intent to show equitable rights on the part of Mrs. Budd can avail them. They must, so far as they repose themselves on the Budd deed, stand or fall by their legal title. No objection to jurisdiction has been set up by the defendants; and they cannot now say that the plaintiffs had a remedy at law.

X. But if the defendants obtained the naked legal title under the Budd deed, they will not in equity be permitted to set it up against the plaintiffs under the facts and circumstances here proved. John Garretson and others, the grantees in Joshua's deed of February, 1818, assumed to act, and did act as owners of the fee. As such they conveyed to John G., expressly stating in their deed to him that the premises are the same conveyed to them by Joshua. John G., after this conveyance, claimed and acted in all respects as owner of the fee, and so held himself out. Assuming the naked fee still to have been in Joshua or his heirs at law, John G. at all times had in his hands the full means and power to perfect the formal, legal title in himself; and *quoad* all the parties in this suit is to be deemed to have done so. He dealt with the plaintiffs and all the world as owner of the fee; and in reliance on this, the debt to the plaintiffs was contracted. The defendants admitted and assert the fee to be in him; they (the Chemung Canal Bank)

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expressly assert it in their bill filed against the plaintiffs; and both the banks take their mortgages from the parties as owners of the fee, and expressly state in the mortgages the premises to be the same conveyed to John G. by John Garretson and others. They are thus estopped from denying this title. After all this, and with full knowledge of the plaintiffs' right, the defendants obtain the deed from Mrs. Budd. They obtain it for a consideration merely nominal, and part with nothing to obtain it; and if their statements are true, they practised a gross fraud on Mrs. Budd in obtaining it. Both parties having treated and dealt with John G. as the owner of the fee, and contracted their debts and obtained their securities accordingly, and the plaintiffs having by fair and due legal means obtained the preference, the defendants ought not to be permitted to destroy this preference by hunting up and purchasing the mere formal, legal title, for a nominal consideration; and all this with full knowledge of the plaintiffs' position. In truth, the real and substantial claim of the defendants is under their mortgages; and by these should the rights of the parties be determined; and the defendants should not be permitted to abandon these and to convert the mere form and shadow of the Budd title into a substantial ground of claim. At all events the defendants will not be permitted to set up title under the Budd deed without paying to the plaintiffs (who represent all John G.'s title and interest in the premises,) all the incumbrances which were held by John G. against Joshua.

XI. The defendants obtained no title by the comptroller's deed. The deed was invalid on its face. The premises were in actual occupancy at the time it was given; and at the time it was due. The possession of the defendants, the grantees in this deed, (assuming them to have been in possession,) would prevent the title from passing, as against the true owners.

*E. Howell & S. Stevens*, for the defendants. I. The president, directors and company of the Steuben County Bank are seised of the lands conveyed to them by Budd and wife, of a perfect estate in the same in fee simple, and the complainants

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have no interest therein, legal or equitable. On the 22d day of October, 1817, Joshua Mersereau, jun. was seised in fee simple of the premises in question, by operation of the deed of the executors of Harmanus Garretson, of the 15th day of June, 1814, subject only to the incumbrance of the mortgage of the same date, to secure the payment of the consideration of \$4777,50. The judgment in favor of William Smith against him, docketed on the said 22d day of October, 1817, became a lien upon the premises subject to the incumbrance of that mortgage. The deeds of Joshua Mersereau, jun. and his wife of the 9th day of February, 1818, and the 28th day of the same month, to the executors of Garretson, conveyed to them his estate in the premises, charged with all liens and incumbrances existing upon it at the time in favor of other persons; and the mortgage of the 15th day of June, 1814, being merged in the fee, and also actually satisfied and discharged, the judgment of Smith remained a valid lien. (*Burnet v. Deniston*, 5 *John. Ch. Rep.* 35. *Mills v. Comstock*, *Id.* 214.) The sale of the premises by the sheriff of the county of Steuben to Eleazer Lindsley, on the 28th of February, 1818, by virtue of the execution issued on the judgment in favor of Smith against Joshua Mersereau, jun. and his deed upon the said sale, were valid and sufficient to convey all the estate and interest of Mersereau in the premises at the time of the docketing of that judgment, and the mortgage of the 15th day of June, 1814, being satisfied and discharged, Lindsley became seised of a perfect estate in the premises. By operation of the judgment, execution, sale and conveyance under it to Lindsley, the whole estate of Joshua Mersereau, jun. in the lands in question, and that of the executors derived from him, was divested, and their interest under the deed was turned into a mere personal claim or right of action against him, upon the covenants of seisin, warranty and against incumbrances therein contained. And as those covenants were broken by the incumbrance of the judgment in favor of Smith and the sale under it, attornment of Joshua Mersereau, jun. and his possession as the agent of Lindsley, it was competent for the executors to waive the right of action

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upon those covenants or altogether discharge them by parol, and receive a new security or other equivalent for their damages sustained by such breach. (*Delacroix v. Bulkley*, 13 *Wend.* 71.) And even if the covenants had not been broken, the executors could discharge them by an executed parol agreement. (*Dearborn v. Cross*, 7 *Cowen*, 48.) There may be a parol waiver even of a written agreement (and therefore of a covenant) in equity; (*Bottsford v. Burr*, 2 *John. Ch. Rep.* 416;) and the agreement made by Garretson with Joshua Mersereau, jun. and the acceptance of the performance by him and the receipt of the consideration, and the subsequent use and appropriation of it by John Garretson and his co-executors, and particularly by the final sale and assignment to John G. Mersereau of the bonds and mortgages given and assigned by Joshua Mersereau, jun. in performance of that agreement, are full evidence of a waiver by the executors of the performance of the covenants contained in the deed of Joshua Mersereau, jun. to them. At law, or in equity, accord and satisfaction is a good bar to an action of covenant; (1 *Com. Dig.* 130, *Accord and Satisfaction*, A. 1;) and the agreement between John Garretson, Joshua Mersereau, jun. and Eleazer Lindsley, and the performance by Lindsley and Mersereau, and acceptance and appropriation by all the executors, of the securities given and transferred by Mersereau to them, were sufficient to satisfy and discharge those covenants. (*Strang v. Holmes*, 7 *Cowen*, 224.) By the will of Harmanus Garretson directing the lands in question to be sold and converted into money, and the proceeds distributed amongst his children, and that purpose existing and continuing at the time of the arrangement and settlement between John Garretson, Joshua Mersereau, jun. and Eleazer Lindsley, a court of equity is bound to regard that land as property, of the species into which it was by the will directed to be converted, so long as the purpose and object of the testator exist and for the purpose declared, to regard it as money; and the proceeds of that land, when sold, goes to the executors as personal assets, subject to the same rules as apply to other personal assets in their hands. (*Bogert v. Hertell*. 4 *Hill's Rep.*

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492. *Craig v. Leslie*, 3 *Wheat. Rep.* 563. 4 *Cond. Rep. U. S. Sup. Court*, 335. *Kane and wife v. Gott*, 24 *Wend.* 641.) A bond and mortgage taken by executors to secure the payment of the consideration upon a sale under such a power is assets in the hands of the executors, subject to the same disposition and control by them as other assets are, and the sale and assignment of such bond and mortgage by one executor without the consent of his co-executors is valid to transfer the same to the purchaser and bind all the parties in interest. *Bogert v. Hertell*, 4 *Hill*, 503.) By the sale and conveyance of the lands by the executors to Joshua Mersereau, jun. the power created by the will was well executed; (*Saunders v. Saunders*, 2 *Litt. Rep.* 315;) and the conveyance by Joshua Mersereau, jun. to them being defeated by the incumbrance, the only proceeds or avails of the sale remaining, were the damages recoverable upon the covenants in the last deed. And those damages, when recovered, would be assets in the hands of the executors in the same manner as if they had been received in direct payment for the land, or upon a bond and mortgage or other security taken for the payment of such consideration; and until they were recovered and collected remained a mere debt in the hands of the executors, subject to be sold, transferred, received, compounded or discharged by them or either of them, and the act of John Garretson in compounding or discharging those covenants, was valid and binding upon his co-executors. (*Bogert v. Hertell*, 4 *Hill's Rep.* 503. 2 *Will. on Ex.* 683, 684. 1 *Shep. Touch.* 484, 497: *Wheeler v. Wheeler*, 9 *Cowen*, 34.) The admissions and declarations of one of several executors, are evidence of the existence or discharge of a debt; and the written disclaimer of John Garretson is proof that all the claims of the executors upon the lands in question, except the mortgage of the 16th of December, 1819, had been discharged, and is binding upon all claiming under Garretson. (2 *Will. on Ex.* 683, and the authorities there cited. *Jac'son v. Myers*, 11 *Wend.* 537. *Van Rensselaer v. Aikin*, 22 *Id.* 549. *Beach v. Wise*, 1 *Hill*, 612.) And so of the admissions and declarations of John G. Mersereau, under whom the con-

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plainants claim. (*Vide authorities last cited.*) If the acts of John Garretson in the settlement of the claims of the executors against Joshua Mersereau, jun. were not originally valid or binding upon his executors, they were made so by their subsequent adoption and ratification of the agreement then made by him, and the acceptance and appropriation made by them of the consideration paid, and securities given and transferred by Joshua Mersereau, jun. to them in performance of that agreement, upon the ground that a party who avails himself of the benefit of a contract, will be bound by it, and this even in case of an infant. (*Van Rensselaer and others v. Aikin and others*, 22 *Wend.* 549. *Nelson v. Carrington*, 4 *Munf.* 332, 340. *Overbach v. Heermance*, *Hop. Rep.* 337. 2 *Kent's Com.* 240, and the authorities there cited. *Munro and others v. Allaire*, 2 *Caines' Cas. in Er.* 194. *Delafield v. State of Illinois*, 26 *Wend.* 226. *Lawrence v. Taylor*, 5 *Hill*, 107.) The covenants in the deed from Joshua Mersereau, jun. being satisfied and discharged before the lands were conveyed by Lindsley to him, were to all legal intendment expunged from it, leaving only the clauses of bargain, sale and transfer of the title as in a quit claim deed; and the title subsequently acquired by Joshua Mersereau, jun. did not enure to the benefit of the executors. *Jackson, ex. dem. McCrackin, v. Wright*, 14 *John. Rep.* 193. *Jackson v. Peck*, 4 *Wend.* 300.) By the acceptance of the mortgage of the 16th of December, 1819, the executors admitted the title of Joshua Mersereau, jun. in the premises, and by their subsequent entry expressly under that mortgage reiterated that admission. And in an action of ejectment to recover the possession after payment of the mortgage, they and all claiming under them would be estopped from setting up title in themselves at the time of the execution of the mortgage, so far as the mere right of possession was in question. (*Osterhout v. Shoemaker*, 3 *Hill*, 513. *Jackson v. Myerss*, 11 *Wend.* 537. *Hunter v. Trustees of Sandy Hill*, 6 *Hill*, 407. *Northrop v. Wright*, 24 *Wend.* 227.) By the agreement between John Garretson, Joshua Mersereau, jun. and Eleazer Lindsley, and the performance on their part by Lindsley & Mersereau, and

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the acceptance by Garretson and subsequent acquiescence by the other executors, they were bound to do all things necessary to carry the spirit of that agreement into effect, and if the disclaimer executed by Garretson was not valid, and a release from the executors to Mersereau was necessary for that purpose, a court of equity will presume it to have been done: for that court, regarding the substance and not the mere form of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. (*Craig v. Leslie*, 3 *Wheat.* 563. 4 *Cond. Rep. U. S. Sup. Court*, 335.) If the executors, in the sale of the lands in question, are to be regarded as trustees and not as executors, equity will consider all things done by them, that, in pursuance of the agreement between Garretson, Lindsley, and Joshua Mersereau, jun., they ought to have done; because their neglect to perform that agreement would prejudice the cestuis que trust, who had no other means of obtaining satisfaction of their claim against Joshua Mersereau, jun. or compensation for the land sold to him, but by the performance of that contract on the part of the trustees. And it is a rule in equity that no act of the trustee shall prejudice the cestui que trust. Nor will the forbearance of trustees in doing what it was their duty to have done, affect the cestui que trust; since in that case it would be in the power of trustees, by delaying their duty, to affect the rights of other persons; wherefore the rule in all such cases is, that what ought to have been done shall be considered as done. (1 *Cruise's Dig.* 525, *tit.* 12, *ch.* 4, § 9, and cases there cited.) The judgment in partition and the sale upon the execution and conveyance of the sheriff, vested in Lindsley a perfect estate in the 1000 acres off the south side of the tract assigned to persons unknown. (2 *R. S.* 2d ed. 247, § 36, and 252, § 74.) By that proceeding the executors were concluded, as well as all other persons claiming title to those lands; and by the deed of Lindsley to Joshua Mersereau, jun. they vested in him without being affected by his deed and the covenants therein contained; for the reason that his title to that portion of the land was, by the



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proceeding in partition, derived through the executors subsequent to his conveyance to them. The deed of Lindsley, executed after the satisfaction of the covenants in the deed of Mersereau to the executor, vested in Joshua Mersereau, jun. a perfect estate of inheritance in fee simple in the lands in question, subject only to the incumbrance of the mortgage of the 16th of December, 1819, to secure the payment of \$1700; and upon his death intestate, those lands descended to his daughter Jane Maria, as his only child and heiress at law. The mortgagee holds in the character of grantee or assignee of the mortgagor when he takes possession. He then has all the right, title and estate of the mortgagor. Then he acquires, and the mortgagor loses, an estate liable to be sold on execution: the legal title is in him for the time being: he is liable for covenants running with the land, and the relation of landlord and tenant does not exist between the mortgagor and mortgagee in possession, so as to estop the latter from denying the title of the former. (*Astor v. Hoyt*, 5 *Wend.* 617. *Blight's Lessee v. Rochester*, 7 *Wheat.* 535. 5 *Cond. Rep. U. S. Sup. Court*, 339, and the cases there cited. *Watkins v. Holman*, 16 *Pet.* 34, and the cases there cited. *Osterhout v. Shoemaker*, 3 *Hill*, 518. *Jackson v. Rowland*, 6 *Wend.* 665.) The defendants, the Steuben County Bank, being in possession of the premises under their mortgage, had lawful right to purchase in an outstanding title to protect themselves, and may set it up against the mortgagor, and all claiming under him, and every other person. (*Astor v. Hoyt*, 5 *Wend.* 617. *Jackson v. Smith*, 13 *John.* 406. *Jackson v. Given*, 8 *Id.* 137. *Dale v. McEvans*, 2 *Cowen*, 118. *Osterhout v. Shoemaker*, 3 *Hill*, 518. *Cameron v. Erwin*, 5 *Id.* 272, 280.) The estoppel even between landlord and tenant applies only to actions affecting the possession. For the tenant after restoring the possession to his landlord may as plaintiff avail himself of any title which he has been or may be able to acquire. (*Jackson v. Spear*, 7 *Wend.* 401. *Jackson v. Walker*, 7 *Cowen*, 637, 644. *Jackson v. Harper*, 5 *Wend.* 248. *Woodfall's Land. & Ten.* p. 155.) In this court, the very right of the parties is in issue: and the

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complainant having elected to prosecute his claim here, instead of resorting to his action of ejectment, he cannot avail himself of the estoppel, which relates only to the question of possession. A deed void for adverse possession, is only void as against the party in possession. As respects all other persons, it is effectual to vest the title of the grantor in the grantee; and between them is conclusive, so that the grantee can maintain ejectment in the name of the grantor, and a recovery will enure to the benefit of the grantee. (*Kennedy v. Gardner*, 4 *Hill's Rep.* 469. *Livingston v. Proseus*, 2 *Id.* 526.) The deed from Budd and wife to the Steuben County Bank is valid and effectual in law to vest in them an absolute estate of inheritance in fee simple in the lands in question, subject only to the incumbrance of the mortgage of the 16th of December, 1819. (*See the authorities above cited.*) The cestuis que trust had the whole beneficial interest in the lands devised, and they might elect to take the land, before conversion was actually made, or the money afterwards. The whole matter was within their control, and the conveyance by Lindsley to Joshua Mersereau, jun. by their direction and for their benefit, discharged the trust. (*Craig v. Leslie*, 3 *Wheat. Rep.* 563. 4 *Cond. Rep. U. S. Sup. Court*, 335. *Munro and others v. Allaire*, 2 *Caines' Cas. in Er.* 183, 194.) John Garretson and Dinah Mersereau, two of the three cestuis que trust in the trust created by the will of Harmanus Garretson, who were beneficially interested in three-fourths of the whole trust estate, not only allowed that arrangement, but were actually parties to the agreement between Joshua Mersereau, jun., John Garretson and Eleazer Lindsley, by which it was effected, and are concluded by it, as are James Guyon and his wife, the remaining cestuis que trust, by their subsequent acquiescence and ratification. (*See the cases last referred to.*)

II. Montgomery Hunt, the cashier of the Bank of Utica, as such cashier was the authorized agent of the bank and their executive officer, through whom the whole monied operations of the bank, in paying or receiving debts, or in receiving, discharging, or transferring securities, were conducted; and as such cashier he was authorized to take security from Hoffman

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& Mersereau, for the payment of the debt due from them to that bank. (*Fleckner v. Bank of U. States*, 8 *Wheat.* 338. 5 *Cond. Rep. U. S. Sup. Court*, 458. *The Bank of Vergennes v. Warren*, 7 *Hill*, 91.) III. Hunt, in the transactions of the Bank of Utica respecting the paying or receiving of debts, or in receiving, discharging, or transferring securities, and especially in the transaction respecting the debt due to that bank from Hoffman & Mersereau, was the authorized agent of that bank, and such authority may be inferred or implied from the adoption or recognition of his acts by the bank. (*Am. Ins. Co. v. Oakley and others*, 9 *Paige*, 497. *Com. Bank of Buffalo v. Kortright*, 22 *Wend.* 363, 364, 351. *Bank of U. States v. Dandridge*, 12 *Wheat.* 64. 6 *Cond. U. S. Sup. Court Rep.* 445, &c. *North River Bank v. Aymer*, 3 *Hill*, 270.) IV. The parol agreement made by Hunt with John Magee was in relation to matters within the scope of the legitimate business of the Bank of Utica, and is to be deemed the express contract of the corporation itself. (*Safford v. Wykoff, Prest. &c. Bank of Seneca Co.* 4 *Hill*, 448, *per Paige, senator.* 12 *Wheat.* 64.) V. The acts, declarations and admissions of Hunt in making the agreement with Mr. Magee, and in all transactions on behalf of the bank, within the scope of the authority with which he had been really or apparently clothed, are binding upon the Bank of Utica. (*North River Bank v. Aymer*, 3 *Hill*, 266, 270, and cases there cited. *Bank of Monroe v. Field*, 2 *Id.* 445. *Welland Canal Co. v. Hathaway*, 8 *Wend.* 433, *per Nelson, J.*) VI. The chattel mortgage executed by Hoffman & Mersereau to the complainants, and the possession and sale of the lumber by them or their agents after the mortgage became forfeit, was a satisfaction of their debt against the firm, so far as respects the Chemung Canal and Steuben County banks, whether they received the avails or suffered their agent Hoffman to waste or divert them. (*Hertell v. Bogert*, 9 *Paige*, 52.) The parol agreement made between Magee on the part of the Steuben County Bank, and Hunt on behalf of the Bank of Utica, respecting the securities to be given for the debts to those banks, was a voluntary marshalling of the assets of the

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common debtors, and binding upon the parties; (*Whelan v. Whelan*, 3 Cowen, 537, 576; *Rosevelt v. Fulton*, 2 *Id.* 129; *Welland Canal Co. v. Hathaway*, 8 Wend. 483; *Cowen & Hill's Notes to Phil. Ev. n.* 192, p. 200, and cases there cited;) and the execution, by Hoffman & Mersereau, on the 2d day of August, 1834, of the chattel mortgage upon their lumber at Port Deposit, in pursuance of that agreement, and its acceptance by the Bank of Utica, precluded it from resorting to the other effects of the debtors, in violation of that agreement, to the prejudice of the Steuben County and Chemung Canal banks. The acceptance of the chattel mortgage by Hunt was the act of the bank, and as conclusive upon it as if done by resolution of the board of directors. (*Fleckner v. U. S. Bank*, above cited, and the authorities below.) The copy of the chattel mortgage sent to Hunt and the information of its execution sent to him, were notice to the Bank of Utica. (*Bank of U. States v. Davis*, 2 Hill, 452, 461. *Fulton Bank v. Sharon Canal Co.* 4 Paige, 127.) The Bank of Utica were bound to give notice of their dissent to the arrangement made by Mr. Hunt, and the making and acceptance of the chattel mortgage security in pursuance of it, within a reasonable time: and not having done so, their assent and ratification will be presumed. (4 *Kent's Com.* 615, and the cases there cited.) The presumptive evidence arising out of the facts and circumstances of the case, establishes that the complainants did assent to the arrangement between Hunt and Magee, under which the chattel mortgage was executed, and that they accepted and held it as security for their debt, and took possession of the property specified in it, to the exclusion of all the other creditors of Hoffman & Mersereau, and appointed Chancey Hoffman their agent to keep, sell, and dispose of it for their benefit. (*Bank of United States v. Dandridge*, 12 Wheat. 64. 6 Cond. Rep. U. S. Sup. Court, 440, 460. *American Ins. Co. v. Oakley et al.* 9 Paige, 497.) The complainants were in possession of the lumber specified in the chattel mortgage, on the 1st day of December, 1834, on which day it became forfeit for non-payment, and their title to the property became absolute: and being in pos

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session they were answerable for the value, and it operated as a payment, to the whole value of the lumber, which exceeded the whole amount of the debt, and entirely satisfied and discharged it. (*Patchen v. Pearce*, 12 *Wend.* 61. 9 *Id.* 80. 7 *Cowen*, 290. 8 *John. Rep.* 96. *Ferguson v. Lee*, 9 *Wend.* 258. 1 *Hill*, 173. 21 *Wend.* 473. 2 *Hill*, 127. *Case v. Bouton*, 11 *Wend.* 109.)

VII. The judgment of the complainants against Hoffman and Mersereau of the 10th of October, 1834, was fraudulent in fact and in law, and absolutely void. It was fraudulent in fact, because it was given for a larger sum than was due to the complainants, for the purpose of defrauding the other creditors of Hoffman & Mersereau. (*Wilder & Hastings v. Fonday*, 4 *Wend.* 104, *S. C.* 6 *Cowen*, 284. *Burns v. Morse*, &c. 6 *Paige*, 108.) It was fraudulent as against the Steuben County and Chemung Canal banks, because it was entered in violation of the agreement between Mr. Magee and Mr. Hunt, under which the chattel mortgage of the 2d of August, 1834, was given, and by which the Steuben County Bank was prevented from securing their debt against Hoffman & Mersereau, by attaching the property mortgaged. (*Whelan v. Whelan*, 3 *Cowen*, 537, 576. *Rosevelt v. Fulton*, 2 *Id.* 129. *Pike v. Acker*, 2 *N. Y. L. Observer*, 408.) It was fraudulent in law, because it was made and suffered with intent to hinder, delay and defraud the other creditors of Hoffman & Mersereau, and particularly the Steuben County and Chemung Canal banks, and as against them was void. (2 *R. S.* 2d ed. p. 72. *Wilder & Hastings v. Fonday*, 4 *Wend.* 104. *Burns v. Morse*, 6 *Paige*, 108. *Mackie v. Cairns*, 5 *Cowen*, 547.) The Bank of Utica is responsible for the fraud of its cashier and agent in the entering of the judgment; although the president and directors had no actual knowledge of that fraud. (*Jeffrey v. Bigelow*, 13 *Wend.* 518. *Sandford v. Handy*, 23 *Id.* 260. *Bank of U. States v. Davis*, 2 *Hill*, 461.) The complainants had notice of the purpose for which the judgment was entered; for it must be taken for granted that the principal knows whatever the agent knows. (*Jeffrey v. Bigelow* 13 *Wend.* 518.

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*Astor v. Wells*, 4 *Wheat.* 466. 4 *Cond. Rep. U. S. Sup. Court* 513. *Bank of U. States v. Davis*, 2 *Hill*, 461. *Fonblanque's Equity*, 420, 518.) The complainants had other security for their debt by means of the chattel mortgage upon the lumber; and their motive in entering up the judgment is open to impeachment. (*Wilder & Hastings v. Fondey*, 4 *Wend.* 100.) The judgment was entered with the intent to hinder, delay and defraud the Steuben County and Chemung Canal banks, and is void as to them; even if the debt for which it was entered was actually due to the complainants. (*Beals v. Gurnsey*, 8 *John. Rep.* 446. 4 *Wend.* 104, 2 *R. S.* 72, 2d ed. 6 *Paige*, 108. 5 *Cowen*, 547.) VIII. If the judgment of the complainants of the 10th of October, 1834, is valid, they had two funds or securities to which they might have resorted for satisfaction of their debt. The Steuben County and Chemung Canal banks, by their mortgages upon the real estate, could reach that fund, but had no lien upon the lumber specified in the chattel mortgage, and could reach only one of the two funds to which the complainants could resort. The agreement or arrangement between Mr. Magee and Mr. Hunt, and the letter of the former to the latter informing him of the arrangement respecting the securities, entered into between him and Hoffman & Mersereau, and the execution of the chattel mortgage by them, and its transmission to and receipt by Mr. Hunt, were sufficient notice of the subsequent liens of the other two banks. Therefore the complainants were bound primarily to resort to that fund for the satisfaction of their debt, over which they had exclusive control. (*Fonblanque's Equity*, 4th *Am. ed.* 515, note (I) b. 3, ch. 2, § 6. *Reynolds v. Tooker*, 18 *Wend.* 591, 593. *Evertson v. Booth*, 19 *John.* 492. *Hays v. Ward*, 4 *John. Ch. Rep.* 132. *York & Jersey Steamboat Co. v. Associates of Jersey Co.*, 1 *Hopkins*, 469.) The complainants are chargeable with the value of the mortgaged lumber in favor of the other creditors, if they have sold it and received the proceeds, or suffered their agents to waste it, or permitted the mortgagors to convert it to their own use after their right became absolute by the forfeiture of the mortgage, and the property was

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within their power. (*Bogert v. Hertell*, 9 *Paige*, 59, &c.) The complainants were bound in equity and good conscience to use reasonable diligence to collect their debt by means of the chattel mortgage, before resorting to the land under their judgment. (*Bogert v. Hertell*, *supra*.) Before resorting to the land the complainants were bound to offer to the Steuben County and Chemung Canal banks, the benefit of the chattel mortgage. IX. The deed of the comptroller conveyed to the Steuben County Bank the 800 acres sold for taxes; and unless there was an occupant at the time of the conveyance they acquired a perfect title to that parcel of land. (1 *R. S.* 2d ed. p. 399, § 80, and 400, § 84.) The Steuben County Bank were by their tenants the occupants of the premises, if any there was, at the time of the conveyance, and were not bound to serve notice upon themselves. The lands sold were not in the actual occupancy of any person, but were wild uncultivated portions of a large tract. The occupation of Hoffman did not extend to the tax lands, but was limited to the two lots upon which he resided as tenant to Wambaugh. The complainants had no right whatever to redeem the tax lands after the expiration of two years from the sale in 1830. (1 *R. S.* 399.) X. The complainants acquired, by the purchase at the sale under their judgment of the 10th of October, 1834, only the estate of John G. Mersereau in the premises, which was only the possession of an assignee of a mortgagee. (*Wilson v. Troup*, 2 *Cowen*, 195. *Bogert v. Perry*, 1 *John. Ch.* 52; *S. C. in Error*, 17 *John. Rep.* 352. *Jackson v. Bronson*, 19 *Id.* 325. *Phyfe v. Riley*, 15 *Wend.* 248. *Edwards v. Farmers' Fire Ins. Co.* 21 *Wend.* 467, 491. *Runyon v. Mersereau*, 11 *John. Rep.* 534. 4 *Ken's Com.* 159, 160.) John G. Mersereau purchased of the executors only their interest in the premises, with a full knowledge that the whole estate claimed by them was that of mortgagees in possession. The declarations of John Garretson respecting the title, estate and entry of the executors, after the death of Joshua Mersereau, jun. are binding upon him and all claiming under him. (*Van Rensselaer v. Akin*, 22 *Wend.* 549, and cases there cited. *Jackson v. Myers*, 11 *Id.* 537. *Cowen*

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& *Hills' Notes to Phil. Ev.* 651. *Corbin v. Jackson*, 14 *Wend.* 619.) XI. The mortgage of Joshua Mersereau, jun. to the executors of Harmanus Garretson, assigned to John G. Mersereau, remained in his hands a valid lien and incumbrance upon the lands described therein, and by his assignment passed to the Steuben County Bank, and now is a valid, subsisting lien and incumbrance not in any wise merged, satisfied or discharged. (*James v. Morey*, 2 *Cowen*, 246.) The President, Directors and Company of the Steuben County Bank are bona fide purchasers of Thomas R. Budd and his wife, and as to them the judgments held by John G. Mersereau had ceased to be a lien upon the premises, and they ought not to be decreed to hold them subject to the lien of those judgments or the mortgage of the 16th of December, 1819, or any of them. (*Littell v. Hervey*, 9 *Wend.* 157. *Beals v. Gurnsey*, 8 *John. Rep.* 446.)

THE CHANCELLOR. At the time of docketing of the judgment of the Bank of Utica against Hoffman and John G. and James G. Mersereau, in October, 1834, the judgment debtors, or some of them, were in possession of the whole of the premises in controversy in this cause, claiming that John G. Mersereau was the legal owner thereof, under the conveyance of January, 1831. And that possession was continued until it was surrendered to the two defendant banks, as subsequent mortgagees of the judgment debtors, in July, 1836; after the execution of the complainant was in the hands of the sheriff and had been levied upon the premises. If this judgment, therefore, is valid, and had this been a mere possessory action, to recover such possession for the complainant, without the necessity of settling the legal ownership of the fee of the premises, there would be no difficulty in disposing of the case, upon the ordinary principles which are applicable in possessory actions. And the defendant banks, without showing a superior right in themselves acquired subsequently to their entry as mortgagees merely, would not be permitted to hold the possession against the complainant. For where a party enters into the possession of lands claiming under a particular title, he cannot set up an outstanding title in a stranger, as a defence



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to a suit by the owner of the title under which he entered, to recover the possession of the premises. (*Jackson v. Stewart*, 6 *John. Rep.* 34. *Jackson v. De Witt*, 7 *Idem*, 157. *Hart's Lessee v. Johnson*, 6 *Ohio Rep.* 89. *Norwood v. Manow.* 4 *Dev. & Bat. Law Rep.* 449.) But a party who has gone into possession of land as the tenant of another, and acknowledging his title, is only estopped from denying the validity of that title, and setting up a better right in himself, so long as he retains the possession; or during the continuance of the tenancy. For upon the termination of the lease and the restoration of the possession, he may sue and recover back the possession of the premises, upon showing a better title in himself. (*Lessee of Galloway v. Ogle*, 2 *Binn. Rep.* 471. *Weatherby v. Wilson*, 1 *Nott & McCord's Rep.* 374. *Jackson v. Walker*, 7 *Cowen's Rep.* 644. *Jackson v. McLeod*, 12 *John. Rep.* 183. *Camp v. Camp*, 5 *Conn. Rep.* 301.) In the case under consideration, the vice chancellor has not only decreed the delivery of the possession of the premises to the complainant, so as to put the Bank of Utica in a situation properly to contest the alleged title which the Steuben County Bank claimed under the deed of Budd and wife, and under the comptroller's deed, for certain portions of the premises in controversy, but has absolutely prevented the defendants from setting up that title hereafter, in any form of proceeding. It becomes necessary, therefore, to examine the question whether the legal title to a part of the premises, or rather the equity of redemption in that part thereof which was embraced in the \$1700 mortgage to the executors of Garretson, was outstanding in Mrs. Budd, as the sole heiress of her father, at the time of the conveyance from Budd and his wife to the Steuben County Bank, in September, 1837; and also the question whether any title to the 800 acres, specified in the comptroller's deed, passed to that bank by virtue of such deed. The first of these questions I will now proceed to consider.

By the common law, if a grantor, who had no interest, or only a defeasible interest, in the premises granted, conveyed the premises with warranty, and afterwards obtained an absolute title to the property, such title immediately became vested in the gran-

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tee or his heirs or assigns, by estoppel. (*Cov. Coke Litt.* 265, a.) And if the grantor, or any one claiming title from him subsequent to such grant sought to recover the premises by virtue of such after acquired title, the original grantee, or his heirs or assigns, by virtue of the warranty which ran with the title to the land, might plead such warranty, by way of rebutter, or estoppel. as an absolute bar to the claim. (*Cov. Co. Litt.* 365, a. *Terms De La Ley*, tit. *Guaranty*. *Toml. L. D. art. Rebutter*.) This principle has been applied to all suits brought by persons bound by the warranty, or estoppel, against the grantee or his heirs and assigns. So as to give the grantee, and those claiming under him, the same right to the premises as if the subsequently acquired title, or interest therein, had been actually vested in the grantor at the time of the original conveyance from him with warranty; where the covenant of warranty was in full force at the time when such subsequent title was acquired by the grantor. (*Jackson v. Wright*, 14 *John. Rep.* 193. *Brown v. McCormick*, 6 *Watts*, 64. *Comstock v. Smith*, 13 *Pick.* 119.) And where an estoppel runs with the land it operates upon the title, so as actually to alter the interest in it, in the hands of the heirs or assigns of the person bound by the estoppel as well as in the hands of such person himself. Thus, if a man by deed indented make a lease of land, reserving rent, which implies a warranty on the part of the lessor, and the landlord has no interest in the land at the time of the execution of the lease, if he afterwards purchases the land, and then sells it to a stranger, the latter will hold it subject to the lease; and coming in as the assignee, or grantee, of the person who made the lease, will be estopped from showing that the lessor had no interest in the land at the time he made such lease. (1 *Coke Litt.* 19 *Lond. ed.* 47; note 11. 7 *Bac. Abr.*, *Warranty L. Bull v. Wiott*, 1 *Roll's Abr.* 868. *Somes v. Skinner*, 3 *Pick. Rep.* 52. *Trevian v. Lawrence*, 6 *Mod. Rep.* 258.) For as a covenant of warranty runs with the lands, so as to give the heirs and assigns of the grantee the benefit of the estoppel as against the warrantor, it runs with the subsequently acquired interest of the warrantor, in the hands of the heirs and assigns

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of the latter; so as to bind that interest, by the estoppel, as against any person claiming the same under him, *in the post*. (*Fairbanks v. Williamson*, 7 *Greenl. Rep.* 96. *Somes v. Skinner*, 3 *Pick. Rep.* 52. *Stow v. Wyse*, 7 *Conn. Rep.* 214. *Lunsford v. Alexander*, 4 *Dev. & Batt. Rep.* 42. *Jackson v. Parkhurst & Gurney*, 9 *Wend. Rep.* 209.) Judge Lane, in delivering the opinion of the supreme court of Ohio, in the case of *Douglass v. Scott*, (5 *Ohio Rep.* 198,) very correctly says, that the obligation created by an estoppel not only binds the party making it, but all persons privy to him; the legal representatives of the party, those who stand in his situation by act of law, and all who take his estate by contract, stand in his stead, and are subjected to all the consequences which accrue to him. It adheres to the land, and is transmitted with the estate. And in *Phelps v. Blount*, (2 *Dev. Law Rep.* 177,) the supreme court of North Carolina held that where land was vacant and uncultivated, the party entitled by estoppel was in the constructive possession of the land; so as to maintain an action of trespass against a person who went upon the land and cut timber, claiming to do so by virtue of a pretended title in, and permission from, the person estopped. (*See also Sikes v. Basnight*, 2 *Dev. & Batt. Law Rep.* 157.)

Let us apply these principles to the case under consideration: Previous to the conveyance of Lindsley and wife, of the 15th of December, 1819, Joshua Mersereau, jun. the grantee in that conveyance, had conveyed to the three individuals who were the executors of H. Garretson the same premises, in connection with other lands excepted in the deed of Lindsley and wife; with full covenants of warranty, as well as of seisin. And if nothing then had occurred to prevent the covenants of warranty in the deed to the executors from operating by estoppel; upon the title conveyed to Joshua Mersereau, jun. by Lindsley and wife, that title immediately became vested in J. Garretson, J. Guyon and P. I. Van Pelt; so as to vest the absolute fee in them, by estoppel, not only as against Joshua Mersereau, jun. and his daughter and heiress, but also as against the Seneca County Bank, to whom the daughter and her husband subse-

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quently conveyed. And two of the grantees in the deed, of Joshua Mersereau, jun., of the 9th of February, 1818, which had created the estoppel, having subsequently conveyed all their interest in the premises to John G. Mersereau, whose right to the premises was sold under the judgment of October, 1834, the complainant unquestionably obtained the legal title to two thirds of the premises, by the sheriff's deed; even if the title to the other third of the premises is still outstanding in the heirs or devisees of J. Guyon, who appears to have been dead at the time of the conveyance to John G. Mersereau, in 1831.

Although the grantees in the deed of February, 1818, which created the estoppel, are described as executors, there is nothing in that deed to show that the estate was intended to be granted to them as trustees; so as to create a joint tenancy which would belong to the survivors. The estoppel, therefore, vested the legal title to the premises in the three grantees named in that deed, as tenants in common; under the provisions of the act of February, 1786, directing the mode of conveyances to joint tenants. (1 *R. L.* of 1813, p. 54, § 6.) The executor of J. Guyon joined in the conveyance to John G. Mersereau, in January, 1831; and was probably either the devisee, or had power under the will of J. Guyon to transfer the interest of the latter in the premises as tenant in common with the other grantors in that deed. If so, the title to that third of the premises stands upon the same footing as the other two thirds. It however was not material for the complainant to establish that fact in the present case. For it is not pretended that either of the defendants has obtained the title of J. Guyon to that undivided third of the premises, by any conveyance from his heirs or devisees, unless they obtained it through the conveyance to John G. Mersereau in 1831. And as all the other defendants went into possession claiming title to the premises under that conveyance, they cannot set up an outstanding title in a stranger, to defeat a party who claims the premises under the same title as themselves; but by a prior right which counterreaches their claim. (*Ives v. Sawyer*, 4 *Dev. & Bat. Rep.* 51.) The case might have been different, as to this undivided third of the

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premises, if the defendants had shown that they had acquired the title to the same from the heirs or devisees of J. Guyon subsequent to the sale of the interest of Hoffinan & Mersereau upon the execution in favor of the complainant. So far as the mere possession of the land is concerned, the two defendant banks, having entered into possession under the defendants in the judgment, subsequent to the issuing of the execution, must yield up the possession to the complainant, unless they can show a better right in themselves, or establish the fact that the judgment was invalid, as against them. (*Colvin v. Baker*, 2 Barb. S. C. Rep. 206.) And if they were found to relinquish the possession to the complainant, and had no legal or equitable interest in the premises themselves which could be the proper subject of a future litigation, or be affected by the decree in this suit, they cannot complain that the court has erroneously decreed that the complainants are entitled to the whole estate, as well as to the right of possession, of that undivided third of the premises.

It is insisted, however, that the covenants in the deed of the 9th of February, 1818, had been broken at the time of the conveyance from Lindsley and wife to Joshua Mersereau, jun. in December, 1819; and that the arrangement between J. Garretson and the grantee in that conveyance, and the written disclaimer of Garretson, were a satisfaction of the damages which he and his associates had sustained in consequence of the breach of the covenants in the deed of 1818; and thereby prevented the title acquired under the deed of Lindsley and wife from vesting in the grantees in the deed which had created the estoppel. Where the breach of the covenant of seisin affects the whole title, so that nothing passes to the grantees in the deed, a recovery by the grantees for the damage sustained by the breach of that covenant, might have the effect to prevent the operation of the estoppel created by such covenant, or even by the covenants of warranty; by creating a counter estoppel, which would prevent the grantees, or those claiming under them, from alleging that they acquired any interest in the land by the original conveyance to them. (*Stinson v. Sumner*, 9

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*Mass. Rep.* 143. *Porter v. Hill, Idem*, 336.) But as the covenant of seisin does not run with the land, in this state, it is at least doubtful whether a release of the covenant of seisin by the original grantee, would prevent a subsequent conveyance, by him, from carrying to the grantee in such subsequent conveyance the general covenants of warranty, which run with the land. And if it would not, the Steuben County Bank as the grantee of Mrs. Budd, would be estopped, by the covenant of warranty of her father, in his deed of the 9th of February, 1818, from alleging that the grantees did not obtain an absolute and indefeasible title to the premises, by virtue of that deed; which title the complainants in this case have subsequently acquired, in at least two-thirds of the premises, by the conveyance to John G. Mersereau, and the subsequent sale upon the judgment and execution against him and his copartners. For although the grantee in a deed, which contains a covenant of seisin, in connection with general covenants of warranty, and the heirs and assigns of such grantee, are not estopped by such deed from showing that the grantor had no title to the land attempted to be conveyed, the warrantor, and those claiming under him, *in the post*, are estopped, by his covenants, from alleging that he had not a perfect title to the land when he conveyed the same with warranty. And therefore a reconveyance of the land, by the grantee thereof, without covenants of warranty in such reconveyance, will not prevent such original grantee from recovering for a breach of the covenant of seisin contained in the conveyance of the premises to him. (*Bennett v. Irwin*, 3 *John. Rep.* 363. See also *Porter v. Hill*, 9 *Mass. Rep.* 336.)

The covenants of warranty in a deed are not broken until eviction. And in this case there had been no eviction of the grantees of Joshua Mersereau, jun. at the time of the conveyance to him by Lindsley and wife. I see nothing, therefore, which could prevent the operation of the estoppel, by the general covenants of warranty in Mersereau's prior deed to Garretson, Guyon and Van Pelt; so as to vest in them the title, which had been actually divested by the sheriff's sale. And the cer

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tificate in writing of John Garretson, not under seal, which was made subsequent to the deed of Lindsley and wife, could not operate as a counter estoppel, even as to Garretson's one-third of the premises. So far as it had been acted upon by subsequent purchasers, from Joshua Mersereau, jun. who were ignorant of the true state of the title, a court of equity would unquestionably have restrained J. Garretson from setting up the title by estoppel, to their prejudice.

Joshua Mersereau, jun. also had rendered himself personally liable for the payment of the \$1700 secured by his bond and mortgage of the same date, upon an agreement between him and Garretson and the other mortgagees for whom Garretson acted, that Mersereau should receive a conveyance of their legal title to the premises. Or what is more probable, both parties were ignorant of the law relative to the passing of the legal title to land by estoppel; and the giving of the \$1700 bond and mortgage of Mersereau, and the assignment of the mortgages executed by other grantees of the premises were intended to be in satisfaction of the claim of the grantees in the deed of February, 1818, for the supposed loss of the land, by the sheriff's deeds, and the subsequent conveyance of Lindsley and wife to Joshua Mersereau, jun. Upon the first supposition, a court of equity would have compelled a specific performance, by requiring Garretson, Guyon and Van Pelt to convey the legal title, upon the payment of the \$1700 and interest secured by the mortgage. But upon the supposition that both parties had acted under a mistake, in supposing that the grantees in the deed of February, 1818, had lost their title to the land, and that such title was actually in Mersereau by the force and effect of the deed of Lindsley and wife to him, a court of equity would have directed the \$1700 bond and mortgage to be delivered up and cancelled, as having been obtained without consideration. Or rather, the bond should be delivered up and cancelled, for the legal title being already in the mortgagees by estoppel, the mortgage was a mere nullity, as a security upon the land for the payment of the \$1700. And the assignment of that bond and mortgage to John G. Mersereau, simultane-

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ously with the conveyance to him of the legal title to the land itself, could not alter the nature of his estate in the land. Nor was the mortgage in his hands any incumbrance upon the legal title, which was in him at the time of the docketing of the judgment of the complainant.

The conclusion at which I have arrived upon this part of the case, therefore, is that Joshua Mersereau, jun. had no legal estate or interest in any part of the premises at the time of his death; and that if the judgment of the complainant was not fraudulent as against the other creditors of Hoffman & Mersereau, the proper remedy of the complainant was by a suit at law to recover the possession of the premises in controversy. And if the defendants had made a proper objection, in their answer, to the jurisdiction of this court to give relief to the complainant, upon the case made by the bill, the vice chancellor should have dismissed the bill, with costs; but without prejudice to the rights of the complainant in a suit at law. For as Joshua Mersereau, jun. had no interest in the premises in controversy, upon which his mortgage to the executors could operate as an incumbrance, or which could be affected by the outstanding judgments against him, neither the mortgage nor the judgments were such a cloud upon the title of the complainant as would authorize an application to this court for relief. But as the defendants neglected to make any such objection to the jurisdiction of the court, in their answer, and had thus compelled the vice chancellor to decide upon the legal rights of the parties, it was proper for him, in the decree, to declare the invalidity of the mortgage and judgments as liens upon the title acquired by the complainant under the sheriff's deed. For the court of chancery will not refuse to take jurisdiction of a case, and to make a proper decree therein, merely upon the ground that the complainant had a perfect remedy by an action at law; when the parties have submitted themselves to the jurisdiction of the chancellor, without objection. (*Ludlow v. Simonds*, 2 *Caines Ca. in Error*, 56. *Hawley v. Cramer*, 4 *Cowen*, 727. *Gilb. Ch. Pract.* 220. *Grandin v. Le Roy*, 2 *Paige's Rep.* 509. *Rees v. Smith*, 1 *Ohio Rep.* 509.) But where the complain



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ant improperly and unnecessarily comes into this court for relief, and the defendant neglects to make the objection that the remedy of the complainant, if any, was at law, whereby the chancellor is compelled to take jurisdiction of the case, and to decide it upon the merits, he may, in the exercise of a sound discretion, refuse to give to either party the general costs of the litigation here. For this reason, although the vice chancellor did not decline jurisdiction of this case, which was a mere ejectment bill to recover the possession of real estate, upon a legal title, according to the case made by the bill, I think he very properly refused to give to the complainant the general costs of the prosecution of this very expensive suit in the court of chancery.

The deed from Joshua Mersereau, jun. to Garretson, Guyon and Van Pelt, which was produced upon the hearing, merely describes them as executors of H. Garretson deceased ; but does not profess to convey the premises to them in their character of executors. And if the proceedings were different a question might arise whether the grantees in that deed did not take the title as tenants in common ; so that the conveyance from the two surviving grantees, and the executor of the deceased grantee, to John G. Mersereau conveyed only two undivided two-third parts of the premises in question. For there is no evidence in the case that the executor of J. Guyon, one of the grantees in the deed of February, 1818, was either the heir at law of the decedent, or was authorized by his will to convey his real estate. But I think the parties, by the pleadings, are precluded from raising that question in this suit. The bill alleges that the land conveyed to Joshua Mersereau, jun. by the executors as such, was *reconveyed* by him to the said executors, and that his wife also executed a quit-claim deed of the premises to the said executors, by which her interest in the premises was also vested in the said executors. These are allegations that the reconveyance of Joshua Mersereau jun. to them, and the quit-claim of his wife to them, were to the grantees in their characters of executors. And the answer of the defendants admits this reconveyance by Joshua Mersereau, jun. to the executors, and the quit-claim of his wife to them, nearly in the same words of the allegations in the bill. These facts

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admitted by both parties in their pleadings, are to be taken as true for the purposes of this suit. And if so, the reconveyance vested the title in the executors as joint tenants, and not as tenants in common, under the provisions of the statute on that subject. (*See 1 Rev. Laws of 1813, p. 54, § 6.*) The title therefore was vested in two of the grantors in the conveyance to John G. Mersereau, as the surviving executors, by the estoppel and the death of their co-executor; and passed by the last mentioned conveyance to the grantee named therein. And the deed of February, 1818, showing a conveyance to Garretson, Guyon and Van Pelt as tenants in common, must be laid entirely out of view; as tending to establish a fact which is contrary to what both parties have alleged and admitted by their pleadings. For the purpose of the decision which I am to make, I must consider it as settled that the legal title to the whole of the premises in controversy became vested in John G. Mersereau, by the deed to him from the surviving executors, and from the executor of their deceased co-executor.

I do not agree with the vice chancellor that the comptroller's deed is void, either as to its form, or because it does not specify the year in which the taxes were laid for the non-payment of which the premises were sold. The provision in the revised statutes directing the comptroller to execute a conveyance of the property sold, *in the name of the people of the state*, is not new, but was contained in the revised laws of 1801 and of 1813. (*1 Rev. Laws of 1801, p. 555. 2 Rev. Laws of 1813, p. 517.*) And I believe the comptroller's deeds upon tax sales have been in the same form in this respect under all of these laws. They have so far back as I have examined, which is more than a quarter of a century. And thousands of titles now depend upon conveyances executed in the same form as the deed in this case. When we recollect, too, that deeds in this form have been executed by such men as Chief Justice Savage, Mr. Justice Marcy, and Silas Wright, who have heretofore filled the office of comptroller, and probably with the sanction of the several distinguished jurists who have from time to time occupied the station of attorney general of the state, and that many

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recoveries have been had in our courts upon such deeds without objection, it is too late to pronounce such deeds invalid, upon a mere technicality, suggested for the first time by the counsel for the complainants in this suit. The maxim that custom is the best interpreter of the law is applicable to this case. (4 *Inst.* 75. 2 *Eden's Rep.* 74. *Hopk. Ch. Rep.* 267.) In the case of *McKeen v. Delaney's Lessee*, (5 *Cranch's Rep.* 32,) the late Chief Justice Marshall, in relation to the validity of the proof of a deed says, were the act of 1715 now for the first time to be construed, the opinion of this court would certainly be that the deed was not regularly proved, and therefore not legally recorded. But the court put its decision in favor of the validity of the recording of the deed upon received custom in the state where the deed was given; although no judicial decision had been made there upon the question. And in relation to the practical construction which had been given to the same statute, Chief Justice Tilghman says, "so extensive and deep rooted is the practice that numerous titles depend on it, and it would be unpardonable to disturb it now by a critical examination of the words of the act." (1 *Serg. & Raw. Rep.* 106.) Lord Coke's expression, (*Coke Litt.* 186 a,) that common opinion is good authority in law does not apply to a mere speculative opinion in the community as to what the law upon a particular subject is. But when such opinion has been frequently acted upon, and for a great length of time, by those whose duty it is to administer the law, and important individual rights have been acquired or are dependant upon such practical construction of the law, this expression of the learned commentator upon Littleton is entitled to great weight.

It is true the deeds which have been given by the comptroller from time to time, are not technically given in the name of the people. But they recite the substance of the statutes under which the sales have been made, the non-payment of the taxes which have been charged upon the land in pursuance of such laws, the advertisement and sale of the premises, the payment of the purchase money into the treasury of the state, by the grantee, and that the premises have not been redeemed; and

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the comptroller under the official seal of the state belonging to his office, and, as the deed states, by virtue of the authority vested in him by law, conveys the lands so purchased, either to the original purchaser, or to his assigns; which deeds are witnessed by one of the officers mentioned in the statute. No one, therefore, upon examining the deed of the comptroller, executed in this form, can doubt as to the intention of the comptroller to convey the premises for and in behalf of the people of the state; although the people are not technically described as the grantors in such conveyance.

Again; if this supposed error in the form of the comptroller's deed was now material, it would not justify a court of equity in declaring that the purchaser had no right to the land by virtue of his purchase; but the comptroller, if necessary, would be required to give him a new deed, in the proper form. There is nothing in the statute requiring the deed to state in what year the tax was assessed, for the non-payment of which the premises were sold. The deed states that such taxes have been assessed and returned to the comptroller, and have remained unpaid for two years from the first of May following the year in which they were assessed; which is all that could be necessary to show, upon the face of the deed, that the comptroller was authorized to make the sale. And if the owner of the land wished to ascertain for what year the taxes were assessed, he could do so without any difficulty by referring to the books which by law are required to be kept in the comptroller's office.

The deed in question, therefore, if the lands assessed, and the part conveyed, had been so described therein as to be capable of location, would have been sufficient, *prima facie*, under the practical construction which has been given to the tax laws, to entitle the Steuben County Bank to the 800 acres of the premises in controversy which are claimed under that deed. This *prima facie* evidence of ownership, however, was liable to be rebutted, by showing that the tax returned to the comptroller as unpaid had actually been paid to the collector. (*Jackson v. Morse*, 18 *John. Rep.* 441.) It might also be rebutted by showing that the land thus sold and conveyed by the comp

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troller, or some part of it, was actually occupied by some person at the expiration of two years from the time of the sale, or that it was so occupied at the time of the giving of the comptroller's deed; so as to throw upon the party claiming under such deed the necessity of proving that he had given, to the occupant, the notice to redeem which is required by the statutes on this subject.

There are two provisions of the statutes in relation to notices to occupants, which are applicable to all sales made subsequent to the 5th of April, 1830, for the non-payment of taxes; and which are necessary therefore to be considered in the decision of this case. The original eighty-third section of the article of the revised statutes relative to sales for unpaid taxes, and the conveyance and redemption of lands sold, (1 R. S. 412,) declared that whenever any land sold for taxes, and conveyed by the comptroller, should at the *time of such conveyance* be in the actual occupancy of any person, the grantee, or the person claiming under him, should serve a written notice on such occupant, stating what was necessary to redeem the land from the sale, and that unless the same was redeemed, within the time prescribed, the conveyance of the comptroller would become absolute. And the 87th section of the same article required the grantee or other person claiming under him, in cases of such occupancy, in order to complete his title to the land so conveyed, to file with the comptroller the affidavit of the service of the notice upon the occupant. These provisions of the revised statutes are still in full force; having never been repealed or abrogated. But the act of the 5th of April, 1830, made a further provision on the subject of notices to occupants of lands which should thereafter be sold for taxes, and where the occupants should be in the occupation of such lands, at the expiration of *the two years given for the redemption thereof*; that is, at the end of two years from the last day of the comptroller's sale for taxes; as provided for in the original sixty-sixth section of the article of the revised statutes before referred to (1 R. S. 409.) In case the lands sold by the comptroller are occupied at the expiration of the two years, whether conveyed by the comptroller or not at that time, the act of April, 1830, required the purchaser, or

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the person claiming under him, to serve the notice upon the occupant within one year from the expiration of such time of redemption; and to file the evidence thereof with the comptroller within one month after such service. And the time for redeeming the land, when thus occupied at the expiration of the two years from the time of the sale, is six months from and after the filing of the evidence of the service of such notice with the comptroller. (*Laws of 1830, p. 112.*)

The effect of these several statutory provisions is that if the land sold by the comptroller for taxes, or any part thereof, is actually occupied at the end of the two years from the close of the sales, the purchaser, or his assignee, must serve the notice required by the act of April, 1830, upon the occupant, and file the evidence of such service with the comptroller, within the times prescribed by that act, or by the subsequent act amending the same, (*Laws of 1844, p. 397,*) or he will lose the benefit of his purchase. Where he serves such notice, and files the evidence of such service upon the comptroller, within the time prescribed, if the lands are not redeemed within the six months allowed by the act of 1830 for that purpose, his title will become perfect, as soon thereafter as he shall have obtained the comptroller's deed; whether such deed shall have been given before or after the service of such notice. (*Laws of 1830, p. 113, § 3. 1 R. S. 3d ed. 466, § 105.*) In case however the lands sold were not occupied at the expiration of the two years from the time of sale, but there is an actual occupant of the land sold, or of any part of it, at the time of the giving of the comptroller's deed, then the original eighty-third section of the article of the revised statutes before referred to still applies. And in that case the title of the purchaser will not become absolute, under the comptroller's deed, until six months after he shall have served the occupant with the notice to redeem specified in the eighty-fifth section; and shall have obtained the comptroller's certificate that evidence of the fact of such service has been filed, and that the land was not redeemed by the payment of the redemption money into the treasury within six months after the service of such notice.

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But in cases not coming within the scope of the act of April, 1830, there is no time limited by law for giving notice to the occupant of the land who was in such occupancy thereof at the time of giving the comptroller's deed. And the only effect of a neglect to give such notice is to extend the time for redemption of the land, and the perfecting of the title of the purchaser.

In the case under consideration, therefore, if the lands assessed and sold had been properly described, and no part of the 800 acres was occupied at the expiration of the two years from the time of sale, the vice chancellor should not have deprived the Steuben County Bank of the benefit of what the owner of the land would have been required to pay to redeem the same; but the decree should have directed that amount to be paid by the complainant, or that the Steuben County Bank should be permitted to complete its purchase of the 800 acres by giving the notice required by the provisions of the revised statutes in such cases. The fact that the 800 acres were actually occupied at the date of the comptroller's deed, in December, 1837, is fully established. For the case shows that T. L. Mersereau leased the whole of the premises in controversy from the two defendant banks, on the 4th of November preceding the giving of that deed, for the term of one year; and he went immediately into possession under that lease. It is true, as to one half of the premises, he was the tenant of the grantee in the comptroller's deed. But that did not authorize the grantee in such deed to perfect his title as against the complainants' paramount claim upon the land, or as against the Chemung Canal Bank, without giving the notice required by the statute. This question was fully considered by the late Chief Justice Savage, in the case of *Jackson v. Esty*, (7 Wend. Rep. 148.) And the supreme court there decided that it was not necessary that the occupant of the land sold for taxes should be the owner thereof; and that an occupant who was not the owner could not waive the service of a notice on him, so as to perfect the title of the purchaser without an actual service of notice upon such occupant, and without furnishing evidence of such service to the comptroller. That decision I think was in accordance with the true construction

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of the statute ; which requires service of the notice to be made upon every person who is an actual occupant of the premises included in the comptroller's deed, whoever he may be, and the obtaining the comptroller's certificate, as conditions precedent to the vesting of the title of the owner of the land in the grantee in such deed, or in those claiming under him.

In this case, however, I have arrived at the conclusion that the sale by the comptroller is one which came within the provisions of the act of April, 1830 ; because a part of the premises at least were occupied by the Messrs. Lewis at the expiration of the two years allowed by law for the redemption of the 800 acres from the sale. And the original purchaser at the comptroller's sale, whoever he was, lost his right to perfect his title ; by his neglect to serve the notice upon them within the time prescribed in that act. The pleadings and proofs show that as early as 1831, John G. Mersereau, claiming to be the owner of the premises conveyed to him by the deed of Garretson and others, contracted to sell 1000 acres off of the north end thereof to the Messrs. Lewis ; that they moved on to the land, and exercised acts of ownership over the same by improving parts thereof and getting lumber from the residue of the 1000 acres, until some time in 1834. And the maps produced in evidence show that the land so occupied by the Messrs. Lewis, included nearly two-thirds of the 800 acres sold by the comptroller for taxes ; even if the same should be laid out in such a form as to exclude the whole of the two Pier lots, which had been actually occupied from a much earlier period. It has been very correctly decided, by the late supreme court, that if any part of the premises sold for taxes is actually occupied at the times specified in the statutes relative to the giving of notices to the occupant, the purchaser must give the prescribed notice to the occupant of such part of the premises, and obtain the comptroller's certificate, that such notice was given and that the premises were not redeemed within the time prescribed ; before he can complete his title to any part of the premises included in the sale. (*Comstock and wife v. Beardsley*, 15 *Wend. Rep.* 348. *Bush v. Davison*, 16 *Idem*, 550.)



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Again; I am inclined to think the premises assessed were so described that it is impossible to locate the 800 acres, intended to be sold out of the northwest corner thereof, to be laid out in a square form as nearly as may be. The lands were assessed to John Garretson; but the quantity of land does not correspond with that embraced in the mortgage to the executors, of December, 1819; nor with that which was vested in the executors by estoppel, north of the Dinah Mersereau lot, which in the assessment is described as the land of her husband Joshua Mersereau the elder. Two of the boundaries, the south and the west, can be ascertained without any difficulty; and perhaps the east might have been ascertained by showing what lands were occupied and claimed by other persons, to the north of the Ryers lot and adjoining the river, at the time the assessment was made. But the tract assessed is bounded on the north partly by the town line and partly by Rathbone's lands. And none of the witnesses can recollect that any person by the name of Rathbone ever owned or occupied any lands in that township west of the Tioga river. The boundary intended was probably the land of some occupant who was in possession of land south and adjoining the Pier lots. But even if that fact was ascertained it would be necessary to ascertain the width, north and south, of the land assessed, as well as its extent on the east, for the purpose of locating the 800 acres. For that quantity of land laid out in a square form in the northwest corner of the township would run so far east as to include a part of the Pier lots; which were undoubtedly assessed to actual occupants, from the time of the conveyance thereof in 1819. As the lands described in the comptroller's deed could not be located, for want of a proper description of the 2401 acres, in the northwest corner of which the lands sold were to be laid out in a square form as nearly as might be, the sale was invalid. And the Steuben County Bank would not have acquired any title to any part of the premises in controversy, by virtue of the comptroller's deed, even if no part of the premises which that deed was supposed to cover had been actually occupied at the expiration of the two years from the

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time of the sale, or at the time of the giving of the deed by the comptroller in December, 1837.

The most important question in this case is, whether the judgment, under which the complainant claims title to the premises in question, was fraudulent and void as against the defendant banks, as creditors of the firm of Hoffman & Mersereau. And in examining this question it is proper to ascertain, in the first place, whether the decision of the vice chancellor was right in suppressing the deposition of Hoffman, and in denying the application, made on the part of the complainant, to suppress the deposition of Cotton, one of the attorneys employed by the firm of Hoffman & Mersereau to draw the bond and warrant to be executed by them and to enter up a judgment thereon against them in favor of the complainant.

If Hoffman was an incompetent witness, the release produced at the hearing did not restore his competency, even if that release had been duly proved before the closing of the proofs in the cause. It is merely a release of his personal liability upon the judgments, in favor of the complainants, as a copartner or joint debtor with the defendants John G. and James G. Mersereau, for the consideration of one dollar; in pursuance of the provisions of the act of April, 1838, for the relief of partners and joint debtors. (*Laws of 1838, p. 243.*) But it leaves those judgments, and the debts for which they were recovered, in full force against his copartners. And if his copartners should hereafter be compelled to pay any part of those debts, either because the title to the land sold upon the execution on one of those judgments failed, or for any other cause, it would leave him still liable to them for his share of the debts. The effect of the release is not therefore to discharge any interest which the witness has in the event of the suit, in favor of the complainant against the defendant banks; but merely to compel the complainant to seek redress against John G. and James G. Mersereau in the first instance, and leaving them to their remedy from the witness in case the complainant recovers any thing against them. To restore the competency of the witness, if he was in fact incompetent in consequence of any contingent

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liability for those debts, depending upon the event of this suit, the complainant should not only have released Hoffman but also the other members of the firm of Hoffman & Mersereau from such contingent liability.

Again ; I think this release was not properly proved so as to affect the question of the competency of the witness, even if such release amounted to any thing if properly proved. Where it only appears from the examination of the witness himself that he is interested in favor of the party calling him, or that he is otherwise incompetent, the objection to his competency may be removed in the same manner that it was created. And the witness may be examined, by the party calling him, to show that his interest has been removed by a release, or to prove any other fact to establish his competency at the time of his examination. But where his interest, or other incompetency, appears *aliunde* the witness cannot be examined for the purpose of showing his competency, by testifying to the execution of a release, or to any other fact. (*Greenl. Ev.* 471, § 423. 13 *Mart. Louis. Rep.* 709. 4 *Serg. & Rawl.* 298. 1 *Cowen*, 540.) The testimony of Hoffman therefore should not have been received to prove the execution of the release to himself from the complainant.

Nor could *ex parte* affidavits of other persons be received, after the proofs in the cause had been closed, to prove that this release had been executed and delivered to Hoffman before he was examined as a witness. As the release which was produced on the hearing was neither dated nor witnessed, the acknowledgment by the party executing it was only evidence that he had executed it at or before such acknowledgment. Not that it was executed previous to the examination of Hoffman as a witness. The acknowledgment of the release, therefore, which was long subsequent to such examination, would not have aided the complainant, even if notice had been given of the intention to use the release, on the hearing, ten days before the proofs were closed ; as required by the 75th rule of the court. This release therefore must be laid entirely out of the question in deciding upon the competency of Hoffman as a witness for the complainant.

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But whether such release was or was not regularly proved, the vice chancellor was right in supposing that Hoffman was interested in favor of the complainant in establishing the fact that the lands in controversy belonged to John G. Mersereau, at the time of the docketing of the judgment against Hoffman & Mersereau, or to some or all of the defendants in the judgment. The lands of a judgment debtor were not liable to be sold on execution by the English common law. But by the statutes of extents and elegits, they were set off to the judgment creditor until his debt should be paid. And more than three centuries since, a statute was made there, giving a remedy to the creditor to whom the debtor's land had been delivered in extent upon elegit, where the tenant by elegit was afterwards evicted out of or from the possession of such land, without any fault on his part. (*Stat. 22 Hen. 8, ch. 5.*) As this was a part of the general law of England at the time of the first settlement of this state under the charter to the Duke of York, it became a part of the common law of the colonists, in connection with the principles of the statutes of extents and executions then existing in England. But when, in 1732, the statute of 5 George 2d, chapter 5, subjected real estate in the colonies to sale upon execution in the same manner as personal property, the writ of eligit was virtually abolished here. The equitable principle of the statute 32 Hen. 8, chapter 5, however, still applied to the case of a creditor who had purchased the real estate of his debtor upon execution. And of course, it continued to be a part of the law of the colony; though the particular form in which the relief had been given was no longer strictly applicable to the sale under an execution. For the land was frequently sold to a stranger to the judgment, and the judgment was thereby satisfied. And the courts of several of our sister states have frequently acted upon the equitable principle of the English statute on this subject, by giving relief upon an application to their equitable powers. I have no doubt therefore that it is a proper subject of equity jurisdiction here, and has been so from the time when the statute subjecting real estate in the colonies to be sold on execution became a part of the law of the colonies.

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In the first revision of our laws the legislature attempted to give a remedy at law, in the supreme court, to the purchaser of lands upon execution, or to his heirs or assigns, where he or they had been evicted on account of any irregularity in the proceedings, or want of title in the judgment debtor, or by reason of any prior incumbrance thereon. (*Law of 19th March, 1787, § 7. 1 Greenl. Laws, 407.*) And the same provision, in substance, was contained in the revisions of 1801 and of 1813. (1 *R. L. of 1801, p. 391, § 10. Id. of 1813, p. 504, § 11.*) It is doubtful, however, whether this provision applied to a case where the plaintiff in the execution was himself the purchaser. If not, it left the law as to him precisely as it stood before; and only gave a statutory remedy to a stranger to the execution, who had become the purchaser and had been evicted, against the plaintiff, or the defendant, in the judgment and execution who ought in justice and equity to refund the purchase money to him. Although that statutory provision was in force for more than forty years, I am not aware that it ever came before any of our courts so as to obtain a judicial construction, except incidentally in the case of *Woodcock v. Bennet*, (1 *Cowen, 711.*) Nor have I been able to learn that any proceedings were ever commenced under it. But while it was in force the case of *Lansing and others v. Quackenbush*, (5 *Cowen's Rep. 38,*) came before the supreme court, upon a summary application to the equitable power of that court for relief. There one of the plaintiffs in the execution had become the purchaser, at the sheriff's sale, of lands which were represented to be the property of the defendant, but which afterwards were ascertained to belong to another person. The court said there was clearly a remedy in the case; but refused to give relief, upon a summary application, upon the ground that the more appropriate remedy was in a court of equity. In a subsequent case, however, where the sheriff had sold personal property which was supposed to belong to the defendants in the execution, and had applied the proceeds of the sale upon the execution, but the real owner of the property had sued him and the judgment creditor, and had recovered of them the value of the property, the su

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preme court, upon motion, in behalf of the original judgment creditor, directed the endorsement of the proceeds of the sale upon the execution to be stricken out; and allowed him to take out a new execution for the amount of his judgment. (*Adams v. Smith and Parmeter*, (5 Cowen, 280.) The same equitable principle was acted on by that court in the subsequent case of *Richardson v. McDougall*, (19 Wend. Rep. 80.) The statutory provision contained in the revision of 1830, (1 R. S. 375, § 68,) clearly does not apply to the case under consideration. For that only gives an action, to the purchaser, against the plaintiff in the execution, for whose benefit the property was sold. And merely in those cases where such purchaser has been evicted in consequence of an irregularity in the proceedings concerning the sale, or in consequence of the judgment being vacated or reversed. There is indeed a remedy over against the defendant in the execution, in favor of the plaintiff therein; but it is only given to him after he has been compelled to refund the purchase money, upon the sheriff's sale, to the purchaser who has been thus evicted. Where the plaintiff in the judgment is himself the purchaser, and has been evicted for want of title in the judgment debtor, his remedy depends still upon the equitable principle of our colonial common law, derived originally from the statute of Henry the 8th as applied to sales of land upon execution; which became the substitute for an extent by elegit. This equitable principle has been applied, by analogy, to sales of personal property and chattel interests in lands, where the plaintiff became the purchaser and was subsequently deprived of the benefit of his purchase, for want of title in the judgment debtor. And where the common law did not provide for such cases they were proper subjects for the interference of the court of chancery; or for relief upon a summary application to the equitable power of the court out of which the execution issued. In the territory comprising the present states of Massachusetts, New Hampshire and Maine, where no court of equity existed, the case was provided for by the colonial law of 1671, which provided that where a party had obtained an execution and levied the same

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upon lands, houses or goods, if it afterwards appeared that such lands, houses or goods did not belong to the party against whom the judgment was rendered, the party who had thus levied his execution thereon, by mistake, upon making it appear to the court which rendered the judgment, such court should order a new execution for satisfying the judgment; notwithstanding the former execution returned. (*See opinion of Mr. Justice Woodbury, in Whiting v. Bradley, 2 New Hamp. Rep. 85.*)

In the case of *Jones v. Henry*, (3 *Litt. Rep.* 435,) the court of appeals in Kentucky decided that the plaintiff in the execution, who had indemnified the sheriff for selling property which it was afterwards ascertained did not belong to the judgment debtor but to another person who had recovered the value thereof in an action against the sheriff, was entitled to relief against the judgment debtor to the extent of the sum endorsed upon the execution. This decision was afterwards followed by the same court, in the case of *Price v. Boyd*, (1 *Dana's Rep.* 436.) A similar decision was made by the supreme court of Illinois, in the case of *Warner v. Helm*, (1 *Gilm. Rep.* 220.) The equitable principle before referred to and which is recognized in these decisions is applicable to the case now under consideration. For it is alleged in the bill, and admitted in the answer, that the complainant purchased the premises at the sheriff's sale, under a belief that the title was in the judgment debtors or one of them at the time of the docketing of the judgment. And this is admitted by the answer of the defendants. Indeed, in the statement of their property, furnished to the complainant and to the defendant banks in the spring of 1834, Hoffman & Mersereau represented to the complainant that they were the owners of the John Garretson lands of 4100 acres. The case therefore is like that of *Muir v. Craig*, (3 *Blackf. Rep.* 293;) where the supreme court of Indiana granted relief to the purchaser, against the judgment debtor who had represented the lands sold by the sheriff as belonging to him, but it was subsequently ascertained that such was not the fact. I am aware that the supreme court of Pennsylvania, in the case

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of *Freeman v. Caldwell*, (10 *Watts' Rep.* 1,) has decided that a sale of real or personal estate to the amount of the judgment is an absolute satisfaction of the debt. And also that the plaintiff is without remedy, although it is afterwards established that the property bid off by him did not belong to the judgment debtor, and the same has been recovered of the purchaser by the real owner. But without deciding what the form of the relief should be in the present case, I have no doubt that the Bank of Utica would be entitled to relief in some form, against the judgment debtors, if a decree should be made against that bank upon the ground that none of the judgment debtors had any title to the land sold by the sheriff, either at the time of docketing the judgment or afterwards. And if so, Hoffman was an incompetent witness to prove that the defendants in the judgment, or any of them, were the owners of the real estate in controversy at the time the lien of the complainant's judgment attached, or at any time subsequent thereto and previous to the sale upon the execution. For if the complainant should fail in this suit upon the ground of a want of title in all or any of the judgment debtors, Hoffman & Mersereau would not only be liable for the payment of the amount of their bonds and mortgages to the two defendant banks, but also for the whole amount of the judgment of the complainant. But, on the other hand, if the complainant succeeded in establishing the fact that the title to the property sold under the execution was in the judgment debtors, the liability of Hoffman and his copartners to the Bank of Utica would be discharged, at least to the amount of the bid at the sheriff's sale. The whole of Hoffman's testimony in relation to the title of the judgment debtors, or any of them, to the lands in controversy, or which has any bearing upon that question, was, therefore, properly suppressed, by the vice chancellor.

I think, however, this witness was not disqualified, by interest, to give testimony in favor of the complainant to rebut the charge that the judgment was fraudulent and void as against the two defendant banks. Nor was he incompetent as a witness for the complainant upon the question as to the acceptance



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of the chattel mortgage by the latter, or as to the amount of lumber embraced therein, and of the proceeds thereof, and what was done with such proceeds, and the fact of his agency. And in this court, where many issues are frequently combined in one suit, a witness is not to be rejected altogether because he may be interested as to one part of the case, when as to another part of the case he has no interest whatever. But he may be examined as a witness to that part of the case in which he has no interest, or in which his interest is adverse to the party calling him. (*Gresley on Eq. Ev.* 248. 2 *Wend. Rep.* 201. *Rowe v. Cockrell*, 1 *Bail. Eq. Rep.* 127.)

Hoffman, so far from being interested in favor of the complainant in relation to the question of fraud in the judgment, appears to have been interested in favor of the parties against whom he was called and examined, on this point in the case. For if the title to the land was in the judgment debtors at the time of the giving of the bonds and mortgages to the two defendant banks, a decree against the claim of the complainant upon the ground that the judgment was fraudulent and void as against those mortgagees, would enable the mortgagees to obtain satisfaction of their debts by a foreclosure and sale of the mortgaged premises. But such a decree would not, as between the complainant and Hoffman & Mersereau, prevent the sale of the premises by the sheriff from operating as a satisfaction of the judgment, to the extent of the complainant's bid, and a satisfaction, *pro tanto*, of the debts included in the judgment.

In reference to the testimony of this witness in relation to the acceptance of the chattel mortgage, and to his agency under the complainant, and as to the amount of lumber covered by the mortgage, and the disposition of the proceeds of the sales thereof and the liability of his copartners for the debts of Love, Pickering & Co., Hoffman might be, and probably was, interested in the questions propounded by the counsel for the complainant. That, however, only went to his credibility. But in relation to all these matters I cannot see that he had any interest in the event of this suit. It is true if the complainant should be defeated in this suit, not upon the ground of a wa it

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of title in the premises in controversy in the judgment debtors, nor upon the ground that the judgment was fraudulent, but upon another ground taken in the answer, that the complainant by the chattel mortgage had obtained full security for the indebtedness to the Utica Bank, and that having such security it was inequitable as against the mortgagees, to suffer that fund to be wasted, or misapplied, and to enforce their judgment against the mortgaged premises, Hoffman & Mersereau, or Hoffman alone, would be answerable to the complainant for so much of the property included in the chattel mortgage as would be equal to the amount bid at the sheriff's sale. But on the other hand the witness would receive a corresponding benefit. For by such a decree the premises in controversy would have been applied to the payment of the bonds and mortgages to the defendant banks; for the amount of which bonds and mortgages, Hoffman, as well as the other members of his firm, was liable, at the time of his examination as a witness, and would continue to be so liable if the charge of fraud in the judgment should be disproved, by his testimony, so as to enable the complainant to succeed in this cause. And whatever might be the result of the suit, Hoffman would be accountable to his copartners for their shares of all the copartnership property, disposed of by him, which was not applied for the benefit of the firm. Nor could the evidence given by him in this suit avail him any thing upon that accounting.

For these reasons the vice chancellor should not have suppressed the whole of the testimony of Hoffman; but only so much thereof as related to the title of the judgment debtors, or of John G. Mersereau, to the premises in controversy, at the time of the docketing of the judgment of the complainants. The residue of the decretal order as to the suppression of the testimony of Hoffman, including the direction as to the costs of the motion to suppress, must be reversed; without costs to either party on that motion.

The next question to be considered is whether the vice chancellor erred in refusing to suppress the deposition of H. G. Cotton as a witness for the defendants. The testimony of this

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witness as to what took place, and as to what was said, upon the giving of the bond and warrant, was objected to by the counsel of the complainant, and also by Hoffman himself, who was not a party to the suit. But it was called for not only by the defendant banks, but also by John G. and James G. Mersereau, two of the members of the firm for which he was employed to draw the bond and warrant and to enter up the judgment thereon. He stated that he never was employed by the Bank of Utica, and received no communication from any of the officers of that institution on the subject of the bond and warrant or of the entering of the judgment thereon; and that, as those who employed him differed on the question, he did not know what it was his duty to do as to giving testimony on the subject. And said he preferred to state the facts and leave the question as to their admissibility as evidence, in favor of the complainant, to the decision of the court. The witness then testified, in substance, that a few days before the bond and warrant were executed, Hoffman and the Mersereaus called upon him at his office and said they wished to give a judgment to the Bank of Utica, that the Steuben County Bank and the Chemung Canal Bank were crowding them, and that they owed a number of other debts; that they wished to have this judgment in favor of the Bank of Utica, upon their property, because that bank was friendly to them and would protect them; that the judgment being for a large amount their creditors would not be likely to prosecute them, or force a sale of their property, and that they would have an opportunity to dispose of their lumber and pay up as far as it would go; and it would pay their debts or nearly so; that the claim of the Bank of Utica, as the witness then understood, was between seventeen and eighteen thousand dollars; that Hoffman proposed to give a judgment for a larger amount, somewhere between twenty-three and twenty-five thousand dollars; that upon the witness advising them not to give the judgment for more than was due, as they would be concluded by it, Hoffman replied he had no fears on that subject, for the cashier of the bank was a high-minded and honorable man, and would do what was right; that as one of the

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other members of the firm expressed some reluctance to giving the judgment for so large an amount as Hoffman suggested, the witness inquired if they had the means of ascertaining what was actually due the bank, and they said they did not know that they had; that it was finally agreed that they should go home and make out a statement of the amount of such indebtedness, and that either the witness, or his partner, would call there in a few days and get the amount for which the judgment was to be entered; that in the course of the same conversation it was stated by them that they would have the control of the judgment; that it was not to be given because the Bank of Utica had requested it, but for their own safety; that they had given the bank a chattel mortgage which was a sufficient security; and that Hoffman said the Chemung Canal Bank and the Steuben County Bank had commenced war upon them, and that they took this step to protect themselves. The witness further testified that at the time the bond and warrant were executed he went to the store of Hoffman & Mersereau and they then presented to him a statement of their indebtedness to the Bank of Utica, and he inquired if that was the correct amount due, and they all agreed that it was more than they supposed was due, but said they had not the means of ascertaining precisely what was due to the bank; that the witness then inquired if he should make the bond and warrant for that amount, and Hoffman said yes; that they should probably want to get more money, and if the judgment was given for more than was due, they could get more and the judgment would be security for it; that the bond and warrant were accordingly filled up for the amount mentioned in the statement which they had prepared, and it was executed by the members of the firm of Hoffman & Mersereau; and that the witness then took them for the purpose of entering up the judgment thereon. The witness further stated, that before the judgment had been entered Hoffman called on him and inquired what he had done with the papers; and being told that the witness and his partner were in the habit of entering their judgments at the clerk's office at Geneva, inquired if it could not as well be entered at

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Utica; that being answered in the affirmative, Hoffman said he was going to Utica in a few days and would take the papers to the agent of the witness at that place; and that he at the same time stated to the witness that he wished to leave the papers at Utica himself, so that it might not be known for some days that the judgment was entered, because the Steuben County Bank and the Chemung Canal Bank were about making some searches.

From this statement of the testimony of Cotton, it appears that the whole circumstances which he was called upon to disclose, except the mere fact of the execution of the bond and warrant, which was a matter of no consequence in the cause, were conversations of his clients in reference to the subject of his professional employment; which conversations it is wholly improbable they would have held with him if they had not been under the supposed seal of professional confidence. And I think the true principle in reference to privileged communications between attorney and client to be, that where the attorney is professionally employed, any communication made to him, by his client, with reference to the object or the subject of such employment, is under the seal of professional confidence, and is entitled to protection as a privileged communication. Such appears to be now the settled rule of the courts of England; although it was at one time attempted to confine the privileges to communications made in the prosecution or defence of a suit which had been, or was about to be commenced. The leading cases on the subject there are *Cromack v. Heathcote*, (2 Brod. & Bing. Rep. 4,) in the court of common pleas, and *Greenough v. Gaskell*, (1 Myln & Keen's Rep. 98,) and *Herring v. Cloberry*, (1 Phillips' Rep. 91,) in the court of chancery. The last of these cases was preceded, in this state, by the very well considered opinion of Mr. Justice Bronson in the case of *Coveney v. Tannehill*, (1 Hill's Rep. 33,) in the supreme court. The same correct principles had long previously been recognized in this country, in the opinion of the late Judge Roane of the court of appeals of Virginia, in the important case of *Parker v. Carr and others*, (4 Murf. Rep. 273.) There a lawyer had

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been employed by the grantor to prepare a deed, to be executed by him to a trustee, for his daughter and her issue. And although the client was dead, and the contest was between the parties claiming under such deed and the creditors of the son-in-law of the grantor, the attorney was not permitted to testify as to conversations of the grantor, in relation to the object and the subject matter of the deed; for the purpose of showing that such deed was given to defraud the creditors of the daughter's husband. For it is also a well settled principle in relation to privileged communications, between an attorney and his client, that the seal of confidence is not the seal of the attorney, but of his client. The attorney is by law, as well as by professional honor, bound to keep the seal intact; and it cannot be removed except by the consent of the client.

Professor Greenleaf, in his very valuable and well arranged treatise on the law of evidence, very correctly observes, in relation to such communications, that the seal which the law once fixes upon them, remains forever; unless removed by the party himself in whose favor it was there placed. (*Greenl. Ev.* 278, §243.) And where the privilege belongs to several clients, I do not think any one of them, or even a majority, contrary to the expressed will of the others, can waive the privilege, so as legally to justify the attorney in giving testimony in relation to such privileged communications; especially in a case like the present, where the testimony of the attorney, as to matters communicated to him professionally, equally affects the moral characters of all of his clients; by showing that they employed him to assist them in giving a fictitious judgment for the purpose of defrauding their creditors. Nor does the fact that the client, whose assent to the removal of the seal of professional confidence from privileged communications has not been obtained, is not a party to the suit in which his attorney is called upon to testify, alter the case. (*Per Buller, J. in Wilson v. Rastall*, 4 Term Rep. 760. *Rex v. Withers*, 2 Camp. Rep. 578.)

In this case it appears from the exemplification of the judgment, which is in evidence, that Cotton, the attorney, was a subscribing witness to the warrant of attorney, which he re-

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pared for Hoffman & Mersereau to execute. But that does not alter the case in reference to the admissibility of his evidence as to the declarations of his clients tending to the conclusion that the object of giving the judgment was to hinder and delay their creditors in the collection of their debts, and that it was given for a much larger sum than was justly due to the complainant. For the conversations with his clients, as to which he volunteered his testimony, after the examiner had decided that it was improper, were in no way connected with his character of subscribing witness to the warrant of attorney. The conversations which took place on or before the 20th of September, the day on which the bond and warrant were dated, were previous to the preparation of those instruments; and were in reference to the amount for which he should draw the bond and warrant which he was about to prepare for them in his character of their attorney. The object of his inquiries, to which many of their declarations were responsive, was to ascertain the proper amount to be inserted in the bond and warrant; or rather for what amount they desired to give a judgment to the Bank of Utica.

In the case of *Robson v. Kemp*, (5 *Exp. N. P. Rep.* 53,) which was cited by the counsel for the defendants, upon the argument, to show that an attorney who becomes a subscribing witness to an instrument is bound to disclose all that took place at the time of its execution, Lord Ellenborough expressly declared that the attorney was not bound to disclose what took place in the preparation and concoction of the instrument which he witnessed, or at any other time, not connected with the execution of such instrument. Thus an attorney who is professionally employed to prepare a deed for his client, and who afterwards witnesses its execution, may be compelled not only to prove the execution of such deed, but also to testify whether it was ante dated; whether it was in the same form in which it now appears at the time of its execution, or has been altered; and whether it was actually delivered at the time he subscribed his name thereto, as a witness. So if the deed has been lost, or is in the hands of the adverse party who refuses to

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produce it upon the trial, or for the purposes of the suit, the attorney who witnessed the deed may be compelled to testify, as to the contents thereof; although in the preparation of such deed he was professionally employed. (*See Lord Say and Seale's case*, 10 *Mod. Rep.* 40; *Assignees of Blakely v. Kemp*, 4 *Esp. Rep.* 235; *Lessee of Devoy v. Burke*, 2 *Fox & Smith's Rep.* 191.)

The seal of professional confidence I believe has never been held to cover a communication made to an attorney to obtain professional advice or assistance as to the commission of a felony or other crime which was *malum in se*. The opinion of Chief Baron Gilbert certainly was that the privilege of attorney and counsel did not extend to such cases. (1 *Gilb. Ev.* 277.) And as no one is entitled to the advice or assistance of counsel, or of an attorney, to enable him to do an illegal act, if the question had arisen for the first time in this case, I should have no hesitation in deciding that the communications made by Hoffman & Mersereau to their attorney were not privileged; because they were made for the purpose of getting his professional assistance in the perpetration of a fraud upon their creditors. It is as contrary to the duty of an attorney, or a counsellor, to aid his client, by professional services, in the perpetration of a fraud, or in the violation of any law of the state, as it is to aid him in the commission of a felony; although the moral turpitude of the act may be much greater in the one case than in the other. I can therefore see no good reason for extending the principle of privileged communications to the first class of cases, and not to the last. The practice, however, appears to have been otherwise for more than a century and a half; and I do not now feel authorized to adopt a new rule on the subject.

As early as 1693, in the anonymous case, reported by Skinner, which was tried before Chief Justice Holt at the sittings after Michaelmas term, in the 5th of William and Mary, an attorney who had drawn an agreement between a sheriff and his under sheriff was called to prove that such agreement was corrupt and illegal. But the professional privilege was extend-



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ed to the case. (*Skin.* 404. *Holt*, 76.) By referring to another report of the same case, from the collections of Lord Chief Justice Raymond, it will be seen that the agreement, which the attorney was called to prove the illegality of, was an agreement made in violation of the statute against buying and selling offices. (1 *Ld. Raym. Rep.* 733.) Justice Buller has also a note of the same case, by the title of *Holt v. Tyrrel*. (*Bull. N. P.* 284.) But he is evidently wrong in supposing it was decided in the 13th year of the reign of George the First. For Lord Chief Justice Holt died in 1709; five years before the commencement of that reign. In the case of *Cromack v. Heathcote*, (4 *J. B. Moore's Rep.* 387,) an attorney had been applied to for the purpose of drawing a fraudulent assignment which he declined doing; and the assignment was subsequently drawn by some other person. The attorney first applied to was offered as a witness to prove the fraud. But the court rejected the evidence; upon the ground that the communications made to the attorney were privileged. So in the case of *Hyde v. M——*, (1 *Moll. Rep.* 450, *n.*) the client consulted an attorney as to the best manner of evading the demands of his creditors, and the attorney recommended a fraudulent mortgage, which he prepared accordingly. The attorney being examined as a witness to prove those facts, the master of the rolls suppressed the deposition; as being a breach of professional confidence. And in *Doe v. Harris*, (5 *Car. & Pay. Rep.* 592,) where the question was whether the deed given by an insolvent was not fraudulent; the attorney was asked whether the insolvent had not called upon him to draw the deed for the purpose of defrauding his creditors. Mr. Justice Park rejected the evidence, as a violation of the professional privilege. A similar decision was made by the supreme court of Massachusetts, in the case of *Foster v. Hall*, (12 *Pick. Rep.* 89;) where the client was not a party to the suit, and the attorney was called upon to show that he was consulted by the grantor, in relation to the making of a deed to the complainant. The object of calling the attorney being to establish the fact that such deed was fraudulent. In the case of *Clay v. Williams*, (2 *Munf*

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*Rep.* 105,) where an attorney had been examined as a witness in the court of chancery, and testified that he was employed to draw the bond in controversy, and that it was given for the purpose of defrauding creditors, two of the judges of the court of appeals in Virginia appear to have considered the deposition as legal evidence. But Judge Roane held the matters confided to the attorney, by the parties who employed him to draw the fraudulent deed, to be privileged communications; and that the testimony of the witness, as to the disclosure of the fraudulent object of giving the deed, should be disregarded. The question however was not decided; the other member of the court who heard the argument of the case expressing no opinion upon that point, which did not affect the decree to be made by the court. With the exception of what was said by Mr. Justice Bronson in *Coveney v. Tannehill*, (1 *Hill's Rep.* 36,) my researches have not enabled me to find any thing in conflict with the decisions to which I have referred. I therefore do not feel authorized to say that the fact that Cotton was employed by Hoffman & Mersereau to assist them in a transaction which, from what was said in his presence, he must have known to be a fraud upon their creditors, deprived their communications of the seal of professional confidence. I admit, however, that I should have been much better satisfied if I had found this question an open one; or rather if I had found the decisions of the courts the other way. For I think with the late chief justice of our supreme court, that the privileged relation of attorney and client ought to be permitted to exist only for honest purposes; but not to enable the client to perpetrate a fraud, or to violate the laws, under the advice of counsel, or through any other professional aid.

For the reasons before stated, however, the application of the complainant to suppress the testimony of Cotton ought to have been granted by the vice chancellor. And so much of the decree appealed from as denies that application with costs, must be reversed.

Upon the question of fraud, if the testimony of Cotton could have been received, and the explanations of Hoffman rejected,

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it would have been very difficult to bring the mind to a conclusion that the judgment was not in fact given for much more than was justly due from Hoffman & Mersereau at the date of the bond and warrant. Even with the testimony of Hoffman, I am not perfectly satisfied that the Mersereaus were interested in the firm of Love, Pickering & Co. And if they were not, the Bank of Utica probably had no legal claim upon the firm of Hoffman & Mersereau for payment of any of the notes of Love, Pickering & Co. which were endorsed by C. Hoffman only. But I think the counsel for the defendants was wrong in supposing that only about \$17,500 could properly have been included in the judgment. It is true, the statement which Hoffman furnished to the banks about the first of June, 1834, only showed an indebtedness of about \$17,000 from Hoffman & Mersereau to the Bank of Utica. And this was probably for the amount due upon the eight notes and drafts, copies of which were sent to Groom, at Port Deposit, in Hunt's letter of the 13th of August, 1834; and as constituting the debts which were secured by the mortgage upon the lumber. It appears in that statement which was furnished to the banks, however, that Hoffman & Mersereau owed to Joel Hoffman about \$3300. And probably that indebtedness was for the two notes of \$1200 each, and the one note of \$800, drawn by some of the members of the firm and endorsed by other members thereof; and upon which Joel Hoffman's name also appeared as an endorser. He may therefore have gotten those notes discounted at the bank on his own account. And as the firm of Hoffman & Mersereau were not the makers of those notes, they would not upon the books of the bank be charged to the account of that firm; although they were in fact given to Joel Hoffman for debts of Hoffman & Mersereau, and the names of all the members of the firm were on the notes, as makers or endorsers. It will be seen that the amount of these three notes and of the eight drafts and notes of which copies were sent to Groom as being those included in the chattel mortgage, together with the note of \$1575, of Love, Pickering & Co., all of which are embraced in the exhibit T. C. C., with the interest thereon

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to the 20th of September, 1834, and the costs of protest, correspond exactly with the sum which was inserted in the bond and warrant of that date. This part of the exhibit T. C. C. must have been made at or before the time of the execution of those instruments at the store of Hoffman & Mersereau. And by a reference to the testimony of T. L. Mersereau, it will be seen that in a conversation previous to the execution of the bond and warrant, Hoffman agreed to ascertain and make a calculation of the amount due as near as he could. (*Defts. Dep.* 399.) This supposition is also supported by the testimony of Colling, the book-keeper of the bank. For that witness testifies that Hoffman presented that statement, of the debts included in the papers upon which the judgment was to be entered; and that the witness was called upon to compare that statement with the notes and drafts then held by the bank, and to see if they corresponded in dates and amounts with such statement. The witness made some corrections in red ink; which were only additions of the names of other persons who had endorsed some of the paper. And he added at the bottom of the statement, also in red ink, the amount and particulars of two other notes, drawn by Love, Pickering & Co., then held by the bank, and of one note of Giles Love; all three of which were endorsed by Chancey Hoffman, one of the members of the firm of Hoffman & Mersereau. The names of the other two members of the firm of Hoffman & Mersereau did not appear upon either of the three last mentioned notes, or upon the \$1575 note of Love, Pickering & Co. which was embraced in the statement on which the bond and warrant were based, as prepared by Hoffman. The book-keeper therefore probably could not know whether the bank had any claim upon the firm of Hoffman & Mersereau for the payment of either of those four notes. But from his testimony I have no doubt that the Bank of Utica, at that time, actually held all the notes and drafts embraced in the exhibit T. C. C.; amounting in the aggregate to more than \$26,000. And as John G. Mersereau and James G. Mersereau were either drawers or endorsers of all the other drafts

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and notes embraced in that statement, they were *prima facie* liable to the bank for the payment thereof.

The giving of the bond and warrant, by all the members of the firm of Hoffman & Mersereau, for the amount of the \$1575 note of Love, Pickering & Co. is presumptive evidence that they were legally or equitably liable for the payment of that note; either because they were interested in the last mentioned firm as copartners, or because it was an accommodation note made and discounted for their benefit. And the defendants, who insist that the taking of a judgment, and including therein the amount of that note, is evidence of an intention to defraud other creditors of Hoffman & Mersereau, are bound to satisfy the court that the officers of the bank have intentionally allowed a debt to be included in the judgment for which the bank had no legal or equitable claim upon the judgment debtors.

Although the testimony of Hoffman, contradicted as it is, in many particulars, by the testimony of other witnesses, has not entirely satisfied me that this \$1575 note was properly included in the judgment, the manner in which the members of this firm did their business, and the complicated nature of their various transactions were such that I cannot say the fact is established that such note ought not to have been included. Much less have the defendants established, by any legal testimony, that even the members of that firm intentionally included in the judgment a debt which they knew they ought not to pay; and with the corrupt intention of defrauding their other creditors.

It may also be proper to observe, that if the whole amount included in the judgment was justly due to the Bank of Utica, from Hoffman & Mersereau, any expectation on the part of the members of that firm, or of any of them, that the judgment would be used for the purpose of enabling them to delay or hinder their other creditors, would not render the judgment fraudulent, as to the bank; unless there was some agreement, or at least an intention, on the part of some of the officers of that institution, that the judgment should be thus used. But if the bank was already amply secured for all its legal and

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equitable claims against Hoffman & Mersereau, by virtue of the mortgage upon the lumber at Port Deposit, in Maryland, the taking of this judgment and thereby creating a lien upon all the property of their debtors in this state, might be evidence of such an intention to defraud other creditors.

The letter of the cashier, to Hoffman, post-marked at New-York the 14th of September, is relied upon by the defendants to show that the cashier not only considered the chattel mortgage an ample security for all the debts due to the bank, but that he had made a journey from New-York to Philadelphia for the sole purpose of suggesting the giving of a judgment merely to delay the other creditors of Hoffman & Mersereau in the collection of their honest debts. Such undoubtedly is the construction which a person having but a slight knowledge of human nature would be likely to put upon that letter. My understanding of it is directly the reverse of that, however, when I view it in connection with other facts which are in evidence in this cause. I think the cashier at that time had become seriously alarmed as to the safety of the debts due to the bank; and that he went to Philadelphia for the purpose of seeing Hoffman, and to induce him, if possible, to persuade his copartners to unite with him in a judgment; which would give the bank a further security for its debts by a lien upon their real property in this state. I can well see then, that he was indeed "*mortified* as well as *vexed*," when he supposed Hoffman and his friend Love had kept out of the way to avoid seeing him. This letter, therefore, was probably written to remove the impression that the cashier had visited Philadelphia to press Hoffman for the debts due the bank. And most of it may be considered what is vulgarly called *soft sodder*. This letter was probably forwarded to Erwin Centre, and was received there by Hoffman previous to the giving of the bond and warrant; and if so it had the effect intended, of uniting him to the purposes of the cashier.

But there is nothing in this letter from which it can be fairly inferred that the cashier "had intended to suggest" the giving of a judgment for any thing more than was honestly due from

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Hoffman & Mersereau to the bank. And probably the including therein the three notes upon which Joel Hoffman's name appears as endorser, and which I have supposed were discounted by the bank as business paper of Hoffman & Mersereau held by him, was probably done upon Chancey Hoffman's own suggestion; for the protection of Joel Hoffman, who was perhaps a near relative.

From the evidence in the case I am not prepared to say that the chattel mortgage upon the lumber at Port Deposit was a full and ample security, even for the eight notes and drafts mentioned therein. And it was no security whatever for these three notes on which Joel Hoffman's name appears. Upon the whole, I think the vice chancellor was right in supposing that the defendants had failed in showing that the judgment of the 10th of October, 1834, was fraudulent and void as against the defendant banks, and other creditors of Hoffman & Mersereau.

No one can justify the gross and deliberate fraud which was practised upon the defendant banks, in inducing them to give up the paper which they held against Hoffman & Mersereau, and to allow an extended credit for the greater portion of their debts, upon the supposition that they were obtaining valid securities, by mortgage, upon the real estate of their debtors, free from all prior incumbrances. And the fact that such a fraud was committed, and that Hoffman was the principal therein, detracts very much from the credit to which he might otherwise have been entitled as a witness. But as the Bank of Utica and its officers had no knowledge of, and no participation in that fraud, it can only affect that bank so far as it affects the character of the principal witness of the complainant in this suit.

I think the evidence in the case fully establishes the fact that the Bank of Utica, by its agents, accepted of the chattel mortgage, which was executed by two of the members of the firm of Hoffman & Mersereau. Whether the mortgage was valid to convey the interest of the copartnership to the complainant, in the form in which the mortgage was executed, is a question upon which it is not necessary to express an opinion. But even upon the supposition that the property was properly pledged to

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The Bank of Utica v. Mersereau.

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the Bank of Utica, for the security of a part of the debt for which this judgment was confessed, I do not see how it can avail the defendants as a defence to this suit. There is no pretence, I think, for insisting that the complainant was answerable to Hoffman & Mersereau for the proceeds of the mortgaged lumber which had been sold by any of the members of that firm, or by persons in their employ, previous to the dissolution of the attachment. The mortgage money was not payable until the first of December, 1834. Of course the complainant had no right, nor any authority from the mortgagors, to sell any of the lumber previous to that time. And if Hoffman was agent for the mortgagee, it was only to do what the Bank of Utica was itself authorized to do; that is, to take care of the property and prevent it from being lost, until the mortgage became payable. Before that time arrived the property was attached; and it remained in the custody of the law until some months afterwards. No part of the debts secured by that mortgage had been paid by any sales of lumber at the time the judgment was given. Nor has any part of those debts been actually paid by the proceeds of any sales thereof since that time; though there is evidence to show that, subsequent to the dissolution of the attachment, Hoffman was authorized, by the officers of the Bank of Utica, to sell that part of the mortgaged lumber which he took to Philadelphia. Most of the proceeds of the mortgaged lumber, however; whether sold by Hoffman or by James G. Mersereau; were applied to the use of the firm of Hoffman & Mersereau, either in the payment of debts or otherwise. The only equitable claim, that the defendant banks can have upon the complainant, therefore, arising out of this chattel mortgage, must be that having two securities for a part of the debt embraced in the judgment, and knowing that the defendant banks had a specific lien by mortgage upon the property covered by one of those securities only, it was inequitable to permit Hoffman and Mersereau to receive or have the benefit of the property embraced in the other security; but that the proceeds of the lumber mortgaged should have been applied in payment of the judgment, *pro tanto*. The vice chancellor is right, however.



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in supposing that there is no evidence that the Bank of Utica, or its officers, had any notice of the giving of the mortgages to the defendant banks, until it was too late to secure the mortgaged lumber, or the proceeds of it.

But as a part at least of the debts secured by the judgment, which were not embraced in the chattel mortgage, would still have remained unpaid, the complainant, even in equity, would still have acquired a good title to the premises in controversy in this suit; for the recovery of which premises this ejectment bill has been filed. The only remedy for the defendant banks, therefore, was by a cross bill, or more properly an original bill, on their part, to recover a part of the proceeds of the sheriff's sale; or for an account and payment of so much of the proceeds of the sale of the mortgaged lumber as the complainant might with proper diligence have secured and applied to the payment of the judgment, after notice received of the equitable rights of the defendant banks by reason of their mortgages upon the premises in controversy.

For these reasons the decree appealed from must be reversed and modified, as before suggested, in relation to the suppression of the testimony of Hoffman and of Cotton; and it must be affirmed in all other respects. Neither party having succeeded fully upon these appeals, it is not a proper case to give costs upon such appeals to either party against the other. And as it appears from the defendant's notice of appeal, that they gave security, as required by the revised statutes, to stay the complainant's proceedings pending the appeal, the usual directions must be given for the payment, by the Steuben County Bank, and the Chemung Canal Bank, of the value of the use and occupation of the premises during the pendency of the appeal; and for any damages which the complainant may have sustained by the commission of waste in the meantime.

BRADSTREET *vs.* SCHUYLER and others. (a)

To a bill filed by a *cestui que trust* against the trustees and the other *cestuis que trust*, for the purpose of obtaining a conveyance of the complainant's share of the legal title to real estate, alleged to be in the trustees, and for a partition of the premises, two of the defendants pleaded that neither the complainant nor the trustees in whom the legal title was vested, were, nor was either of them, in possession of the premises at the time of the commencement of the suit; without denying the allegation in the bill that the trustees held the legal title as trustees for the complainant and the other *cestuis que trust* in different undivided proportions; *Held* that the complainant was entitled to a decree establishing the alleged trust, and directing the conveyance of the complainant's share of the legal estate to him whenever the trustees could legally make such conveyance; notwithstanding the whole premises were, at the time, held adversely to both parties.

THIS was an appeal by the defendants Bleeker, Dudley and Miller, from a decretal order of the vice chancellor of the third circuit overruling the plea of the appellants.

*J. F. Seymour*, for the appellants.

*L. H. Palmer*, for the respondent.

THE CHANCELLOR. The object of the bill in this cause appears to be not only to obtain a conveyance of the complainant's share of the legal title to the premises, which is alleged to be in the heirs of Schuyler as trustees, but also to have a partition of the premises between the complainant and the other *cestuis que trust*. The plea is that neither the complainant, nor the heirs of Schuyler in whom the legal title was vested, were, nor was either of them, in possession of the premises at the time of the commencement of this suit. That does not exclude the idea that the *cestuis que trust*, of the heirs of Schuyler, who have put in this plea, are in possession. The question therefore does not arise whether partition can be made of premises between the parties who are entitled to the same

(a) The following cases were omitted in the regular course of the reports, but are considered as of sufficient importance to be inserted here.

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Bradstreet v. Schuyler.

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as *cestuis que trust*, where the premises are held adversely both to the trustee and to the *cestuis que trust*. If the appellants wish to raise that question upon the hearing they will be at liberty to set up the facts in their answer.

Here the plea does not deny the allegation in the bill that the heirs of Schuyler hold the legal title as trustees for the complainant, and for the appellants, &c. as *cestuis que trust*, in different undivided proportions. This is sufficient to entitle the complainant to a decree establishing the alleged trust, and directing the conveyance of the  $\frac{1}{16}$  of the legal estate to the complainant whenever the trustees can legally make such conveyance; even if the whole premises are now held adversely to both. And the appellants being a part of the *cestuis que trust* are proper parties to the bill to obtain that relief.

The complainant may also be entitled to partition, as between her and the other parties who have equitable interests in the land, if the premises are in a situation to be partitioned. The plea certainly does not cover the first part of the relief to which the complainant is entitled, even if it is an answer to the claim for partition. It could not therefore be properly pleaded as a defence to the whole bill, and was properly overruled. Allowing it to stand for an answer, as requested by the appellants, would not have benefited them, but might have deprived them of the right of setting up any other defence by answer. The plea was therefore properly overruled; and the order appealed from must be affirmed with costs. The proceedings are to be remitted to the vice chancellor; and the defendants are to have the same time to answer after service of the order of affirmance as they had at the time of entering their appeal; with liberty to apply to the vice chancellor to extend that time upon due notice of the application to the adverse party.

THE AMERICAN LIFE INSURANCE AND TRUST COMPANY  
vs. BAYARD and others.

THE SAME vs. SACKETT and others.

After a defendant has answered the original bill, and the proofs have been taken in the cause, it is irregular and unauthorized for him, either to answer the matter of the original bill anew, or to put in an answer to a supplemental bill, filed for the purpose of bringing additional parties before the court; and to which supplemental bill he is not a party.

And if the complainant, by mistake, files a replication to an answer thus put in, he will be permitted to withdraw the same, and to move to take the answer from the files of the court.

And if permitting the answer put in by the defendant to remain upon the files of the court will embarrass the proceedings and raise questions which will be productive of delay, it will be ordered to be taken off the files.

THIS was an application on the part of the complainants to withdraw a replication which had been filed to a paper purporting to be an answer of E. E. Boudinot, executor, &c. to a supplemental bill filed against Sackett and others, to which supplemental bill Boudinot was not a party, and to take such answer from the files of the court.

*B. Robinson*, for the complainants.

*W. A. Sackett*, for E. E. Boudinot, executor, &c.

THE CHANCELLOR. It was clearly irregular and unauthorized for Boudinot, who had already answered the original bill, and after the proofs had been taken in the cause, either to attempt to answer the matters of the original bill anew, or to put in an answer to the supplemental bill to which he was not a party. The latter bill was only filed to bring additional parties before the court; and it was not necessary to make him a party thereto. Probably the rights of the parties will be the same, whether this answer is or is not permitted to remain upon the files of the court. But as it may perhaps embarrass the proceedings and raise questions which will be productive of delay, to nor-

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Maples v. Howe.

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mit it to remain upon the files of the court, the complainants are right in not permitting it to remain there. The affidavit explains that it was owing to a mistake in the practice that a replication was filed, instead of applying to take this answer off of the files in the first instance; and it is not too late to correct the error at this time.

The replication must therefore be withdrawn and the paper filed by Boudinot, purporting to be his answer to the supplemental bill, must also be taken from the files of the court, as irregularly and improperly placed there.

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H. & A. MAPLES vs. HOWE and others, administrators, &c.

Where the widow's dower in the real estate of her deceased husband has been assigned to her previous to the application to the surrogate for a sale of the estate of the decedent, for the payment of his debts, the part assigned to the widow for dower should be sold subject to her life estate therein as tenant in dower.

And where the estate of the decedent consists of an entire farm which the surrogate's order directs to be sold together as one farm, the administrator should sell the whole farm, including the part assigned to the widow for dower; subject to her life estate in that part as tenant in dower.

Where the surrogate's order does not direct a sale upon credit, the administrator should sell for cash; unless all the creditors consent to a sale upon credit.

THIS was an appeal by two of the creditors of the decedent from an order of the surrogate of the county of Otsego, confirming the sale of a part of the real estate of N. Howe deceased, by his personal representatives.

*J. Rhoades*, for the appellants.

*A. Taber*, for the respondents.

THE CHANCELLOR. I infer from the order of sale that the farm described in that order was all the real estate which the decedent died seised of in Otsego county; and that it was in-

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*Maples v. Howe.*

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tended by the order that the whole should be sold together as one farm, subject to the widow's dower which had been assigned to her in a part thereof. And as the whole probably was insufficient to pay the debts, the one-third of the farm which had been assigned to the widow should have been sold with the rest ; subject to her life estate in that third as tenant in dower. As the surrogate had not directed the property to be sold on a credit, I do not think the administrators erred in declining to sell in that manner, unless all the creditors who were interested in the fund had thought proper to assent to a sale on credit. To many of them, an immediate payment of a part of their debts would perhaps be more important than the payment of a larger sum at a future time. Where the creditors wish to have the property sold on credit, the most proper course would be to suggest it to the surrogate, at the time of making the order, so that he may inquire into the situation of the property, and the claims of the various creditors, and give the proper directions. Upon the first ground, however, I think the order confirming this sale should be reversed.

And the administrators must be directed to re-advertise the property for sale ; giving notice that the whole farm will be sold together in one parcel, subject to the widow's life estate, as tenant in dower, in the part of the premises which has been assigned to her for her dower. And the terms of the sale must be ten per cent in cash, to be paid down at the time the premises are struck off, to be refunded if the sale is not confirmed ; and the residue to be paid in cash immediately upon the confirmation of the sale by the surrogate ; at which time the administrators are to give the deed.

The taxable costs of both parties upon this appeal are to be paid out of the proceeds of the sale, under the direction of the surrogate. And the proceedings are to be remitted to the surrogate, to carry this decision into effect.

## TRIPP vs. VINCENT and others.

No decree can be founded upon evidence in relation to matters not put in issue, between the parties, by the pleadings.

The proper way of bringing forward a defence which arises after the putting in of the defendant's answer is by obtaining leave to file a supplemental answer, or leave to file a cross-bill.

The release of a debt which is secured by a mortgage may discharge the lien of the mortgage upon the land. But where the debt is secured by the personal obligation of the mortgagor, as well as by a mortgage upon land, the debt will still exist, as a valid claim against the land, although the creditor consents to discharge the personal liability of his debtor, and to look to the land alone, upon which the debt is a lien, for the payment thereof.

Whether the debt itself was intended to be discharged, or only the personal liability of the debtor, is in such cases a question of fact; arising either from extrinsic circumstances, or upon the construction of the instrument which is claimed to be a discharge of the debt.

By the mortgagor's conveyance of mortgaged premises, to a purchaser, *subject to the payment of the mortgage by the latter*, the land becomes the primary fund for the payment of the debt due to the mortgagee. And releasing the personal liability of the mortgagor, who in equity is then only secondarily liable, leaves the mortgage in full force against the land; in the same manner as if the mortgagor had been discharged from his personal liability under the bankrupt act.

THIS was an appeal from a decree of the late vice chancellor of the seventh circuit for the foreclosure and sale of mortgaged premises. The defendants were judgment creditors of the mortgagor, and set up as a defence that the mortgage to the complainant was without consideration, and fraudulent as against the appellants. The facts appear sufficiently in the opinion of the chancellor.

*W. A. Young*, for the appellants.

*A. Taber & L. Birdseye*, for the respondent.

THE CHANCELLOR. The facts disclosed upon the examination of the complainant as a witness upon the creditor's bill filed against the mortgagor render it highly probable that his mortgage was given for some fraudulent purpose, and that the

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Tripp v. Vincent.

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whole amount which the mortgage professes to cover was not in fact due from the mortgagor. It is also evident from the testimony of the mortgagor himself, that the note which formed a part of the alleged consideration was subsequently given up to the complainant, by the mortgagor, without exacting full payment of the amount due thereon; and that too, after the recovery of the judgment of the appellants against the mortgagor, and after the mortgagee must have known that the mortgagor was insolvent and unable to pay his debts. Under such circumstances, if the answer of the appellants had set up that defence, the mortgage ought not to be held as a valid lien upon the mortgaged premises for any greater amount than was in fact due, even if there was no fraud in giving the mortgage originally. The answer sets up no defence, however, except the fraud and want of consideration for the mortgage at the time it was given. And no decree can be founded upon evidence in relation to matters which were not in issue between the parties. For the same reason the release, by the complainant, of the personal liability of the mortgagor, subsequent to the putting in of the defendants' answer, even if it constituted a defence, could not be used for the purpose of defeating the complainant's claim against the mortgaged premises. The proper way of bringing forward a defence which arises after the putting in of the answer is, by obtaining leave to file a supplemental answer, or leave to file a cross-bill. The release in this case, however, constituted no defence whatever. The release of a debt which is secured by a mortgage may discharge the lien of the mortgage upon the land. But where the debt is secured by the personal obligation of the mortgagor as well as by a mortgage upon land, the debt still exists as a valid claim against the land, although the creditor consents to discharge the personal liability of his debtor, and to look only to the land, upon which the debt is a lien, for the payment thereof. Whether the debt itself was intended to be discharged, or the personal liability of the debtor only, is in such cases a question of fact; arising either from extrinsic circumstances, or upon the construction of the instrument which is claimed to be a discharge



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of the debt. In the present case, by the conveyance of the mortgaged premises to Vincent, by the mortgagor, subject to the payment of the mortgage by the grantee, the land became the primary fund for the payment of the debt due to the mortgagee. And the release of the personal liability of the mortgagor, who in equity was only secondarily liable, left the mortgage in full force against the land; in the same manner as if the mortgagor had been discharged from his personal liability under the bankrupt act. (*See Newton v. Scott*, 9 Mees. & Wels. 434.)

The great difficulty in establishing fraud in the giving of the mortgage, in this case, is that there is no evidence whatever that the mortgagor was indebted to the appellants at that time; or indeed that he owed any debts whatever, except a small one for which the mortgagee was himself liable, and for the payment of which debt the mortgagee was otherwise secured. From the affidavits, used upon the application of the appellants to be let in to defend, it appeared probable that their debt was contracted long before the giving of the mortgage; and that when the mortgage was given the mortgagor was insolvent, or in failing circumstances. But as no evidence was produced upon the hearing to show that the mortgagor had any creditors, at that time, who could have been defrauded by the giving of this mortgage, the vice chancellor was not authorized to decree that such mortgage was void as against the appellants; upon the ground that it was given to defraud the creditors of the mortgagor.

The decree appealed from must therefore be affirmed, with costs.

FERGUSON, adm'r, &c. *vs.* KIMBALL and others.

[Criticism, 2 N. Y. 360.]

Upon a rehearing, the case is open, as to the party upon whose application the order for a rehearing was granted, only as to those parts of the decree which were complained of in the petition upon which that order was founded.

Form and requisites of a decree for the foreclosure of a mortgage, and the sale of the mortgaged premises, where the mortgage is conditioned for the support of the widow of the mortgagee, and where the several owners of different parcels of the mortgaged premises are bound to contribute to her support ratably.

THIS was an appeal by the defendants W. Kimball, D. Tucker, and D. Tucker, jun. from a decree of the vice chancellor of the fifth circuit, made upon the rehearing of a mortgage case, after a decree of foreclosure and sale had been made therein.

*W. Crafts*, for the appellants.

*T. E. Clark*, for the respondents.

THE CHANCELLOR. It has long been settled in this court that upon a rehearing, the case is open, as to the party upon whose application the order for a rehearing was granted, only as to those parts of the decree which were complained of in the petition upon which that order was founded. (*Consequa v. Fanning*, 3 *John. Ch. Rep.* 594.) By the original decree in this case the vice chancellor decided and declared, that the condition of the bond and mortgage, for the foreclosure of which this suit was brought, had not been complied with. And he directed a reference to a master to ascertain the amount justly due for that portion of the support of the widow of the mortgagee which ought to have been provided for her, according to the condition of the bond and mortgage, but which had not been provided for by the mortgagor or those claiming under him; with interest. The decree then directed the master to ascertain and report the value of the contributions, if any, which the several owners of the different parcels of the mortgaged premises respectively had furnished towards the support of the

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widow; with interest thereon. And the decree declared that, as between the defendants themselves, in apportioning the damages and costs upon the portions of the mortgaged premises owned by them respectively, on a sale thereof, if sold in parcels, regard should be had to what each owner had contributed; that an equitable apportionment should be made, of the damages and costs, with reference to such contributions, as well as to the value of the respective portions of the mortgaged premises. It further declared that such contribution and apportionment should in no wise affect the lien of the mortgage upon any part of the mortgaged premises; but that entire satisfaction of the whole amount due upon the mortgage was to be made out of the mortgaged premises. The decree then directed that the mortgaged premises, or so much thereof as might be necessary to raise the amount due to the complainant, upon the mortgage, with interest and costs, and which could be sold in parcels, should be sold by the master; that he should pay the complainant his costs, and the amount which had been reported due with interest; and that he should bring the surplus into court to abide its further order. The decree also charged the defendants personally with the payment of any deficiency which might be reported due, to the complainant, by the master.

No complaint was made in the petition upon which the order for a rehearing was granted, that the decree was erroneous because the personal representative of the mortgagee was joined with the widow as a complainant; or because the decree was irregularly made after her death, without bringing her personal representative before the court; or that the bill should have been dismissed because the condition of the bond and mortgage had been performed, and that the declaration in the decree deciding the contrary to be the fact was erroneous. The first objection made to the decree was as to the form of the order of reference; the petitioners contending that as the widow was dead the only inquiry should be who had supported her, and how much was expended in her support, in the manner in which she was supported, and the names of the persons who had furnished such support; in order that they might be enabled to

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get their pay. But in all these respects the directions in the original decree were right, and the provision which the defendants sought to have substituted was wrong. If the widow had not received a sufficient support, suitable to her situation and circumstances, which the mortgagor was bound to furnish according to the condition of the bond and mortgage, that condition was broken. And those who were bound to support her in that manner ought not to be exempted from liability by showing that she had in fact received but a partial support from any person. Nor should the charge upon the mortgaged premises be limited to the cost of the support which she had actually received, although it might not have been more than a tithe of what she was entitled to according to the condition of the bond and mortgage.

The complainant, as personal representative of the person to whom the bond and mortgage was given, for her benefit, will hold the amount recovered by him, under this decree, as the trustee for the creditors or distributees of the deceased widow. And when administration is granted upon her estate he must account to her administrator for the amount so received; to be applied for their benefit. The objection therefore that the personal representative of the widow was not before the court, if it would have been valid at any time, as I am inclined to think it would have been had it been raised at the original hearing, did not arise under the petition for a rehearing. For there was no complaint in that petition that the cause was not revived as against her personal representative previous to the original hearing of the cause.

The second objection contained in the petition upon which the order for a rehearing was granted, was to the decree of sale; the defendants insisting that the decree should have contained a provision that if the sum reported due was not sufficient to sustain the jurisdiction of the court, the bill should be dismissed with costs; and that if the sum reported due was sufficient for that purpose that the defendants pay the amount reported due upon the mortgage to the persons entitled thereto for supporting the widow, or that so much of the premises be sold as would pay that sum; and that the part of the premises

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which was owned by such of the defendants as had not paid their share for the support of the widow, be sold, or in such equitable manner as the court might direct. The first part of this objection certainly ought not to be sustained. For there was nothing before the court to show a want of jurisdiction on the ground that the matter in controversy was not more than \$100. And if more than that sum was *claimed* to be due, the court could not be divested of its jurisdiction to make a decree for the sale of the mortgaged premises, even if the master should come to the conclusion that less than \$100 was in fact due.

Besides, in this case it appears that the mortgagor was insolvent; so that there could be no remedy by a suit at law upon the bond. And from the nature of the case the mortgage could not have been properly foreclosed under the statute, even if it had contained a power of sale; as it was given as a security to cover unliquidated damages. The result of an attempt to foreclose a mortgage of that kind under the statute would only be to drive the owners of the mortgaged premises to file a bill in this court for relief. In such a case, therefore, where the costs are in the discretion of the court, if the actual amount in controversy is over \$100, it would be wrong to insert any provision in the decree, even exempting the defendant's land from liability for the costs of the suit; in case the amount actually due should turn out to be less than \$100.

The other objection to this part of the decree proceeds upon the supposition that the master has been authorized, by the order of reference contained in such decree, to inquire as to the value of the different portions of the mortgaged premises, and to apportion the amount due among the different owners thereof; whereas he is only directed to inquire how much each owner has already paid. And that part of the decree is not complained of in the petition for a rehearing. The part of the decree which directs an apportionment must be construed as a mere declaration of the principles upon which the rights of the defendants are hereafter to be adjusted, between themselves, after sufficient of the premises shall have been sold to pay the amount reported due. I do not see any thing in this case to take it out

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of the general principle, that where a mortgagor, who is personally liable for the debt, sells the mortgaged premises in parcels to two or more persons at different times, such parcels shall be charged with the amount due upon the mortgage in the inverse order of their alienation. If that was the objection intended to be made to the decree, it was a question between the defendants only, in which the complainant is not interested. And the appellants, in their joint petition for a rehearing, should have agreed among themselves how they wished the premises to be sold; so that the decree might have been modified accordingly. At all events it was impossible, in this case, without entirely changing the parts of the decree not complained of, to give the directions asked for. Nor can the defendants bring a joint appeal, against the complainant, because the court has given a direction to the master, who is to make the sale, which they are only interested in as between themselves, and which they may agree to adjust as they please; or which they might remedy by applying for a separate order, previous to the sale.

The objection that the defendants had been personally charged for the deficiency, if any there should be, having been sustained upon the rehearing, and the decree corrected in that respect, I do not see that there was any error in the decree which was made upon such rehearing. The decree appealed from must therefore be affirmed with costs; without prejudice, however, to the rights of the appellants, as between themselves, as to contribution towards the payment of the amount due upon the mortgage, with interest and costs.

The decree of affirmance must also direct that if the mortgaged premises shall not sell for enough to pay the amount reported due, with interest and costs, the appellants shall pay to the respondent the value of the rents and profits of the mortgaged premises during the time which he may have been delayed by this appeal, or so much thereof as may be sufficient to pay such deficiency, as damages for the delay and vexation caused by the appeal; to be ascertained by a reference to a master, under the direction of the vice chancellor.

## DOUGLASS vs. WHITE and others.

An agreement, by a creditor, to accept a part of an admitted debt in satisfaction of the whole, without any other consideration, is not sufficient to discharge the debtor from the payment of the residue. But if the debtor, in addition to the agreement to pay part of the debt, gives to the creditor any thing which in judgment of law can be considered a benefit to him, and the creditor accepts it as a satisfaction of the whole liability of the debtor, it is a good accord and satisfaction to release the debtor from further liability.

After a judgment creditor has voluntarily discharged the acceptors of a draft upon which a judgment had previously been recovered against the endorser, by taking other security from such acceptors for a part of the debt, he cannot, in equity, enforce the judgment against the endorser of such draft; and the endorser will be entitled to a perpetual injunction restraining the assignee of the judgment from collecting the same of him.

THIS was an application, by the defendants, to dissolve an injunction restraining the collection of a judgment recovered against the complainant in the name of the Bank of Ithaca.

The judgment was recovered against the complainant as the first endorser of a draft, drawn by E. Bissell upon Benson & Lefferts of New-York, payable to the order of A. W. Douglass the complainant, and accepted by the drawees. The complainant was a mere accommodation endorser, for the benefit of the drawer, upon this and another draft for a similar amount. And neither of the drafts had any legal existence until they were delivered to the defendant Hamilton White, upon an advance of money thereon, and, as the complainant alleged, upon an usurious discount. The drafts were afterwards discounted at the Bank of Ithaca, and not being paid at maturity were duly protested and notice given to the endorsers. A suit was afterwards commenced on both drafts in the name of the bank, against Benson & Lefferts as acceptors, and against the complainant as endorser. The acceptors employed attorneys who put in a plea of the general issue for all the defendants. After the cause was at issue, A. St. John, the president and financial agent of the bank, received from the acceptors of the drafts security, by endorsed notes, for one of the drafts, and discontinued the suit against them entirely. But he proceeded to trial and

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Douglass v. White.

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took judgment against the complainant as endorser, for the amount of the other draft. And the bank subsequently assigned the judgment to the defendant Dickinson. The complainant afterwards filed his bill in this cause, alleging among other things, that the drafts were made, accepted and endorsed for the accommodation of the drawer, to enable him to obtain a loan of money thereon from the defendant Hamilton White; and that they were discounted by the latter at the rate of at least one per cent per month; that the complainant did not set up the defence of usury in the suit, because the drafts were given in 1836, previous to the repeal of the provisions of the revised statutes rendering usurious negotiable securities valid in the hands of bona fide holders thereof; and that he then supposed the bank was the bona fide holder of the said drafts; that he subsequently learned that Hamilton White had an understanding or agreement with the bank, under which he was in the habit of taking usurious securities and having them discounted and passed to his credit at the bank, and if they were not paid, of having them charged to his account, and of having the suits for the recovery of the amount of such usurious securities brought in the name of the bank, but at his risk and for his benefit; and that these drafts were received by the bank, and sued in its name, under and in pursuance of that understanding or agreement. He also charged in his bill that subsequent to the judgment, he had ascertained that the suit against the acceptors of these drafts was discontinued under an agreement, between the bank and them, with the approbation of White, providing that if the acceptors would secure the amount of one of the drafts and pay the costs, they should be discharged from the payment of the other draft, and that the suit should be discontinued; and that they secured the payment of one of the drafts and paid the costs of the suit accordingly. And the complainant therefore insisted that by the discharge of the acceptors of the remaining draft, he was entitled to a discharge from his liability upon the judgment, as the endorser of such draft.



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*A. Worden & N. Hill, Jun.* for the complainant.

*John A. Collier,* for the defendants.

THE CHANCELLOR. The charge in the bill, upon the subject of the agreement to discharge the acceptors, is supported by the affidavit of Benson, and by the letter of the president of the bank, with the answer to the same. The answer of White denies that there was any usury in the draft upon which the judgment was obtained; though he declines saying any thing as to the alleged usury in the draft which was paid by the acceptors. But he alleges that the discounting of the two bills by him were entirely separate and distinct transactions. This is a sufficient denial of the usury, for the purposes of this motion. It is not necessary therefore to inquire, in this stage of the suit, what interest White had in the judgment; as the guarantor of Horace White, who received the draft from him and endorsed it to the bank.

Upon the argument of this motion I had some doubts whether this bill was properly framed to entitle the complainant to relief upon the ground that the liability of the complainant was discharged by the agreement to release the acceptors. On further examination, however, I see nothing to prevent him from having relief on that ground, in case he does not succeed in showing that the draft upon which the judgment was recovered was usurious, and that the bank was not in fact a bona fide holder thereof. For though Benson & Lefferts were mere accommodation acceptors for Bissell, they were, as between the endorsers and themselves, primarily liable for the payment of both drafts. And if the endorsee paid either of the drafts to the holder thereof, he would be entitled to be subrogated to the rights of such holder, as against the acceptors. The letter of St. John, the president of the bank, contains a distinct proposition to discharge the acceptors from liability upon one of the drafts, on their giving security for the payment of the other. And the answer of Benson shows that the proposition was accepted. Benson's affidavit also shows it was subsequently carried into effect, by

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the giving of the security for the amount of the first draft, and the payment of the costs of the suit.

An agreement to accept a part of an admitted debt, in satisfaction of the whole, is not sufficient to discharge the debtor from the payment of the residue. But if the debtor, in addition to the agreement to pay part of the debt, gives to the creditor any thing which in judgment of law can be considered a benefit to him, and the creditor accepts it as a satisfaction of the whole liability of the debtor, it is a good accord and satisfaction to release the debtor from further liability. (*Forsyth on Comp.* 17.) And the former supreme court of this state decided, in the case of *Boyd v. Hitchcock*, (20 *John. Rep.* 76,) that where a debtor gives his note, endorsed by a third person, as further security for a part of his debt, and the same is accepted by the creditor in full satisfaction of his claim against such debtor for the whole, it is a valid discharge of the debt; and may be pleaded in bar as an accord and satisfaction. Such seems to be the case in respect to the acceptors of the bill on which this judgment was recovered; as appears from the affidavit of Benson and the letter of the president of the bank.

The defendant Dickinson, as the assignee of the judgment, is in no better situation than the bank was previous to the assignment. And as the bank could not in equity enforce this judgment against the endorser after it had voluntarily discharged the acceptors of the draft, by the acceptance of the endorsed notes for the other draft in discharge of their liability for both drafts, the complainant will be entitled to a perpetual injunction restraining the assignee of the judgment from enforcing the same against him.

The injunction must therefore be retained until the hearing, and the defendants who have made this application, must pay to the complainant the costs of opposing the same.

LA GRANGE *vs.* MERRILL and others

Where a judgment has been recovered against the principal debtor and his sureties, and a third person afterwards agrees with the creditor to become security for the payment of the debt, upon an agreement with such creditor that the new surety shall have the benefit of the judgment, for his protection and indemnity, he has a prior equity over the first sureties, and is entitled to enforce the collection of the judgment for his own benefit and protection.

THIS was an appeal, by the complainant, from a decree of the vice chancellor of the sixth circuit, dismissing the bill. The facts of the case are sufficiently stated in the chancellor's opinion.

*John A. Collier*, for the appellant.

*D. S. Dickinson*, for the respondent.

THE CHANCELLOR. In 1836, L. Seymour was the drawer of a note for about \$10,000, payable to the order of the complainant, J. La Grange, jr., which was subsequently endorsed by the latter and also by S. Stocking and S. Smith, and was discounted by the Chenango County Bank, for the benefit of Seymour. The bank also held, as collateral security for the payment of the same debt, the assignment of a mortgage of B. Stoddard, and a bond and mortgage of Seymour upon the Avery farm. The note not being paid at maturity, a suit was brought by the bank against the drawer and endorsers thereof; and in February, 1837, a joint judgment was recovered against all of them, for about \$10,500. An execution was immediately issued against them, and was levied upon certain personal property of La Grange and Stocking. And the complainant insisted that it was also levied upon sufficient personal property of Seymour to pay the debt, except so much as was subsequently paid out of the proceeds of the premises included in the two mortgages. The vice chancellor, however, came to the conclusion that the execution was not levied upon the property of Seymour, and that the personal property which the latter held, and which was liable

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La Grange v. Merrill.

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to the execution in Broome county, was not more than sufficient to satisfy the previous executions against him. I concur in the conclusion at which the vice chancellor arrived on this point. And the fact that the property of Seymour was not sold on the previous executions, but was permitted by the sheriff to be sold by Seymour himself, under the agreement that the proceeds thereof should be applied in satisfaction of those executions, did not alter the rights of the complainant. For as to him and the Bank of Chenango the result was the same as if the sheriff had himself sold the property and applied the proceeds upon those previous executions. For the payment of which executions the sheriff rendered himself liable, in case the proceeds of the property were not paid to him by Seymour.

Some time in the spring of 1838 an arrangement was made with the attorney of the bank, by which the Stoddard farm was to be sold for \$3000, which was all it could then be sold for in cash. And a contingent contract for securing the benefit of a further price if it could be obtained within a reasonable time was also made. The \$3000 was to be paid to the bank in part payment of the judgment, and the contingent contract was also to be held by the bank as security for the residue. It was further agreed that the defendant Ely should endorse the note of Seymour for the remainder of the principal and interest of the judgment, as further security for that part of the debt; and that for Ely's protection and indemnity, in case he should be compelled to pay that note, he might have the benefit of all the securities held by the bank. Such I conclude to be the result of the testimony in the case; and that the judgment of the bank against Seymour and his three prior endorsers was not to be discharged. In other words, Ely merely became additional security for Seymour and his endorsers, to secure the payment of the debt for which they were all liable to the bank. And there was nothing in the arrangement that would have prevented either of the previous endorsers from paying the debt to the bank, and thus discharging Ely's liability for them; and thus to authorize them to ask for an assignment of all the securities which the bank held, for their protection and indemnity. It does not appear to

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have been any part of the agreement upon which the original endorsement was made, that the Stoddard mortgage should be held specially for the use of La Grange as endorser. The bank therefore had the right to adopt such a course as would give him the benefit of that security, at its fair cash value, in reduction of his liability. I think the evidence shows that was done. In the first place the farm was transferred to a trustee, and a release of the equity of redemption was obtained. And then it was fairly sold for what was considered to be its cash value at the time; giving also to Seymour and his endorsers the benefit of the contingent contract for a further sum, if a further sum could be obtained within the time limited.

Ely afterwards had to make an arrangement, through his friends, to pay to the bank the note which he had endorsed, or rather the judgment recovered thereon. And the bank assigned the judgment against Seymour and his three previous endorsers, for Ely's protection and indemnity; as I think in justice and in equity it was bound to do. And, as I understand the case, the proceeds of all the securities held by the bank for the payment of the original judgment have been applied to such payment; leaving a considerable balance still due, which the respondents were proceeding to collect against the property of La Grange and the other endorsers of the first note, for the benefit of Ely, upon execution on that judgment. The equity and justice of the case, therefore, appear to be clearly with the respondents. And Ely, who became the security for the judgment debt of Seymour and his sureties, upon the faith that he was to have the benefit of the judgment for his protection and indemnity, has the better and stronger equity. Whether he could have maintained a suit against them, for money paid for their use, if the judgment had been in fact discharged, is another and a very different question. I think the decree of the vice chancellor was right upon the merits.

Again; I am inclined to think the objection for want of proper parties was well taken in the answer, and that the bill should have been dismissed on that ground, even if the merits had been the other way. In that case, however, the decree

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should have been without prejudice to the complainant's rights upon a bill properly framed.

Here the bill seeks to set aside an execution and to cancel the judgment, and to obtain a perpetual stay of proceedings upon this joint judgment against La Grange and the two subsequent endorsers. The subsequent endorsers are not parties to this suit. If the defendants, therefore, succeeded in the present suit, Stocking and Smith could litigate the same questions over again in a new proceeding instituted by them or either of them. When the objection was made, in the answer, that the subsequent endorsers were necessary parties, the complainant should therefore have amended his bill and brought them before the court. Having neglected to do so, the vice chancellor, at the hearing, was justifiable in dismissing the bill upon that ground. (*Bailey v. Inglee*, 2 *Paige's Rep.* 278. *Van Epps v. Van Deusen*, 4 *Idem*, 64.)

But as I have arrived at the conclusion that the vice chancellor was right upon the merits of the case, it is not necessary or proper to modify the decree by directing the dismissal to be without prejudice. The decree appealed from must therefore be affirmed with costs.

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WILLIAMS vs. WILLIAMS.

Where the wife, who is the defendant in a suit for a divorce, applies for an allowance for ad interim alimony, and for the expenses of her defence, upon a positive affidavit that she is innocent of the adultery charged, proof that the husband has recovered a verdict in an action of crim. con. against the alleged paramour of the wife, is no defence to the application; such proof not being even presumptive evidence of the fact of adultery, as against her.

UPON an application of the wife, who was the defendant in this suit for a divorce, for an allowance for ad interim alimony, and an allowance to enable her to defend the suit, the com-

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plainant read affidavits to show that he had recovered in an action of crim. con. against the alleged paramour of the defendant. But the vice chancellor made the usual order; from which the complainant appealed to the chancellor.

*M. Fairchild*, for the appellant.

*S. Stevens*, for the respondent.

THE CHANCELLOR. This is an appeal from an order of the vice chancellor of the fourth circuit, directing the payment of \$100 to the defendant, to enable her to defend her suit; and referring it to a master to report a suitable allowance for ad interim alimony. The defendant swears positively that she has not been guilty of the acts of adultery charged in the bill, or either of them. And, for the purpose of this application, that allegation must be taken to be true; the verdict in the crim. con. case, brought by the complainant against White, not being even presumptive evidence of the fact of adultery, as against her.

The vice chancellor was therefore right in directing an allowance to be made to her to enable her to make her defence; and in directing a reference to a master to report what would be a suitable allowance to her for ad interim alimony. The state of the complainant's property, and the claims upon him by those whom he is bound to furnish with the means of support, are such that it is hardly probable he can afford to pay much for alimony. That, however, is a proper subject for consideration by the master; and cannot well be litigated upon ex parte affidavits.

An allowance to enable the defendant to make a defence against what she swears to be an unfounded charge, cannot well be dispensed with. And the only question in my mind is whether the vice chancellor ought to have directed so large a sum to be paid immediately; considering the state of the complainant's family and property. I think \$50, to be paid in thirty days, would have been sufficient for the present purposes

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Warner v. Paine.

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of the defence, and for procuring witnesses to attend the trial. And that it would have been sufficient if the other \$50, for counsel fees upon the trial, had been made payable ten days previous to the circuit at which the cause is noticed for trial. With these modifications, the order appealed from is affirmed.

And the costs upon this appeal are to abide the event of the suit.

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WARNER vs. PAINE and others

An injunction will not be granted, to restrain the defendant from selling personal property, mortgaged to the complainant, under an execution against the mortgagor, which execution was issued prior to the execution of the mortgage.

A mortgage, or assignment, of personal property, to secure the payment of antecedent debts, is not entitled to a preference over an execution previously placed in the hands of the sheriff to be executed; although no levy had been actually made at the time of executing the mortgage, or assignment.

To enable the court of chancery to settle the question, in a suit between a mortgagee and a judgment creditor, whether an execution has been issued for more than was actually due upon the judgment, the judgment debtor is a necessary party.

The judgment debtor is also a necessary party to a bill to set aside an assignment of the judgment, upon the ground of its having been made in violation of the statute restraining attorneys, solicitors, and counsellors from purchasing notes and choses in action for the purposes of prosecution.

*It seems* there is nothing in the statute, to prohibit an attorney from buying a judgment for the purpose of issuing an execution thereon, and collecting the debt. The policy of the statute does not appear to embrace such a case.

THIS was an appeal from an order of the vice chancellor of the first circuit, denying the complainant's application for an injunction, to restrain the defendants from selling personal property mortgaged to her, under execution against the mortgagor.

*H. W. Warner*, for the appellant.

*A. W. Clason, Jun.* for the respondents.



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Warner v. Paine.

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THE CHANCELLOR. If the first mortgage to the complainant was accompanied by an actual delivery of the property and a continued change of possession thereof, the complainant is not entitled to an injunction. For she has a perfect remedy at law to protect her rights. But if there was no delivery of the property to her, at or before the giving of the first mortgage, it does not appear by her bill that such mortgage was filed, and renewed from time to time, so as to make it a lien either at law or in equity, as against a judgment creditor. Nor does she appear, by the bill, to have acquired any rights, as against the judgment creditor, by her second mortgage; for that mortgage was given after the execution was in the hands of the sheriff. And by the recent decision of the court for the correction of errors, in the case of *Ray v. Birdseye*, (*Dec. Term*, 1846,) and the decision of this court in the case of *Slade v. Van Veghten and others*, (11 *Paige's Rep.* 21,) a mortgage or assignment of personal property, to secure the payment of antecedent debts, is not entitled to preference over an execution previously in the hands of the sheriff to be executed; although the sheriff had not actually levied upon the property at the time of the making of such mortgage or assignment.

To settle the question whether the execution has been issued for more than was actually due upon the judgment, the judgment debtors are necessary parties. And the part of the bill which seeks to raise that question being liable to a demurrer upon that ground, is itself a good reason for refusing an injunction upon the ground that the execution was issued for too much. The same objection, of want of proper parties, would exist to a bill to set aside the assignment of the judgment because such assignment was made in violation of the statute restraining attorneys, solicitors, and counsellors, from purchasing notes and choses in action for the purposes of prosecution.

Again; if the judgment, as is alleged, had been purchased in violation of that statute, the complainant is not in a situation to raise the question in this way. If the assignment is void, the judgment is not paid. But it still belongs to the original owner thereof; who is entitled to sue out an execution

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*Bard v. Fort.*

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and collect the whole amount due thereon. Even where a suit is brought upon the chose in action, by the attorney or solicitor or counsellor who has purchased the same in violation of the statute, the plaintiff in the suit is only to be nonsuited, and to pay the costs to the defendant; but the debt is not in fact paid. I find nothing in the statute, however, prohibiting an attorney from buying a judgment, for the purpose of issuing an execution thereon, and collecting the debt out of the defendant's property which is liable to execution. And the policy of the statute does not appear to embrace such a case.

The application for an injunction was therefore properly denied. And the order appealed from must be affirmed with costs.

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BARD and others *vs.* FORT and others.

After a default has been regularly entered, in a foreclosure suit, it will not be opened for the purpose of enabling the defendant to set up, as a defence, that the mortgage was given in violation of the restraining law; except upon the terms of paying the moneys or property actually received from the mortgagee.

Where a part of the mortgaged premises are claimed by a feme covert as her separate estate, the court will not set aside a regular default, in a foreclosure suit, to enable her husband to set up an unconscientious defence to the whole suit; but will make such an order as will protect the wife's claim to her separate estate in that portion of the premises.

THIS was an application by Abram I. Fort, E. Van Vechten, H. Van Rensselaer and wife, and also in behalf of Abby R., the wife of Abram I. Fort, to open the order taking the bill as confessed against them in this case. The bill was filed to foreclose two mortgages, upon lands in the town of Moreau; and the principal defence sought to be set up by all these defendants, except Mrs. Fort, was that the giving of one of the mortgages, and the assignment of the other to the American

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Life Insurance and Trust Company, were done in violation of the restraining law.

*S. Stevens & J. Rhoades*, for the complainants

*O. Clark & N. Hill, Jun.* for the defendants.

THE CHANCELLOR. It is not necessary to inquire whether the defendants had such a defence as they now wish to set up; and which would have availed them in this suit if they had set it up in time. For as the mortgagor in one of these mortgages, and the assignor of the other mortgage, received from the company the full amount of money which is now claimed by these complainants, it would be contrary to the settled practice of this court to grant them the favor of opening the default merely to enable them to set up such a defence; except upon the terms of paying the moneys actually received from the company. (*See Martin v. Broadus*, 1 *Freem. Ch. Rep. of Miss.* 35; *Beach v. The Fulton Bank*, 3 *Wend. Rep.* 573.) The affidavits show that all sums received by the company, or its agents, on account of the mortgages, have been credited thereon. And it is not material to these defendants whether the payments were applied upon the one mortgage or the other; though there is no doubt that they have been rightly applied. The motion as to all the applicants, except Mrs. Fort, must be denied; with costs to be taxed.

The farm of about 90 acres was conveyed by the husband of Mrs. Fort to Charles Rogers, as her trustee, and that circumstance places her case upon a different ground, as regards any interest she has in that farm, either legal or equitable. So far as regards the interest of the husband therein, if he had any which was not conveyed to his father previous to the giving of the mortgage by the latter, he is not entitled to relief. For he himself received the money from the company, for which the \$20,000 mortgage was given, upon the order of his father. And to induce the company to accept that mortgage, and to advance the money thereon, he made and delivered to them an affidavit stating

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that he was well acquainted with the premises mentioned in the mortgage; that the same were all in the possession of the mortgagor, or his tenants, at that time; and that he did not know or believe there was any existing claim or right to any part of the mortgaged premises which could interfere with the mortgage as a security for the \$20,000. He now alleges that about 90 acres of the mortgaged premises belonged to the trustee of his wife at that time, under a conveyance which he had himself made nine years before; although it was not put upon record until after the money had been paid to him, by the trust company, upon the \$20,000 mortgage.

Charles Rogers, the trustee to whom that deed was given, is not a party to this suit. And if the legal title to the 90 acre farm is still in him it cannot be affected by any decree made in this cause. But the farm was conveyed to him upon a mere naked trust for the sole and only use of Mrs. Fort and her heirs and assigns. The title of the trustee, therefore, was turned into a legal estate in the cestui que trust, by the provisions of the revised statutes relative to uses and trusts. As the deed was not on record at the time of the giving and recording the \$20,000 mortgage, and the payment of the money thereon, the complainants would be entitled to a preference, if it distinctly appeared that Abram I. Fort had conveyed that farm to his father, and that the conveyance to the father was recorded previous to the recording of the trust deed. But as nothing of that kind appears upon this application, and the husband now swears that the 90 acre farm did not belong to the mortgagor at the time of the giving of the mortgage, I must presume that Mrs. Fort has an interest in that farm which is paramount to the rights acquired by the company, by their mortgage. It is necessary, therefore, that the default should be opened as to her, and that she should be permitted to appear by her separate solicitor, and put in an answer for herself, to protect her right in the 90 acre farm; unless the complainants will stipulate that the decree shall be so entered as fully to protect her rights, if she has any, in that part of the premises included in the mortgage.

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 Freeman v. Warren.
 

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If the complainants, or their solicitor, within twenty days, shall file a written stipulation with the register, and give notice thereof to O. Clark, the solicitor of the defendants, that notwithstanding the bill has been taken as confessed against Mrs. Fort, a provision shall be inserted in the decree that it shall be without prejudice to any rights which she may have in the 90 acre farm by virtue of the deed to Charles Rogers of March 1827, and that her legal and equitable rights in the farm under that deed shall not be in any way impaired by the decree; and that the part of the premises embraced in the trust deed shall be sold under the decree subject to all her rights therein, in the same manner as if she had not been made a party to this bill of foreclosure, then the motion to open the order taking the bill as confessed is to be denied as to her also. But if such stipulation is not given, the order to be entered hereon must direct that the default be opened as to her, so far as to enable her to protect her interest in the 90 acre farm under the trust deed, and by her separate answer; provided such answer is put in within twenty days after the expiration of the time for giving the stipulation before mentioned.

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 FREEMAN vs. WARREN and others.

Where a defendant has had an opportunity to set up his discharge under the bankrupt act, as a technical defence, and has neglected to do so, the court will not open a regular default for the purpose of enabling him to set up such discharge.

THIS was an application on the part of Adam A. Nestle and Jonas Nestle, two of the defendants, to set aside the order taking the bill as confessed against them and also the decree entered thereon, by default; and to allow the defendant Adam A. Nestle to put in an answer setting up his discharge under the bankrupt act. The bill was an ordinary creditor's bill as

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against the defendants Warren and Adam A. Nestle. And the defendant Jonas Nestle was made a defendant as the assignee of the property of the judgment debtors, under an assignment which was charged in the bill to be fraudulent. After the commencement of the suit and before the time for answering had expired, A. A. Nestle obtained his discharge under the bankrupt act.

*H. P. Allen*, for the complainant.

*D. Cady*, for the defendants

THE CHANCELLOR. The proceedings appear, by the affidavits, to have been regular so far as concerns Adam A. Nestle. The affidavit upon which the bill was taken as confessed as to him, appears to be sufficient, and is in the usual form. In addition to that, Mr. Rice, in his affidavit in opposition to this motion, states the particulars of the service of the notice upon the defendants' solicitor. It was owing to Adam A. Nestle's own negligence that he did not, after he had obtained his discharge under the bankrupt act, apply to his solicitor and ascertain what was the situation of the suit against him, and whether it was necessary for him to plead his discharge in bar of the further continuance of such suit. He has had an opportunity to set up his discharge, as a technical defence; and having neglected to do so the court ought not to let him in to make a defence in which there are no merits. (*Cross v. Hopson*, 2 *Caines' Rep.* 102.) The application, as to him, must therefore be denied with costs.

The case of Jonas Nestle is entirely different. For if his answer is true, he has a good and meritorious defence. And I am also satisfied his answer was served; although it does not appear to have come to the hands of the present solicitors for the complainant, or the former solicitors. It probably was miscarried. But as the answer had been regularly served, the order to take the bill as confessed against Jonas Nestle was in

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Hall v. Fisher.

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regular; although the decree itself, founded upon a due and proper notice of hearing, was technically regular.

The decree must therefore be so far opened as to allow Jonas Nestle to make a defence; but without interfering with the decree, so as to prevent the complainant from collecting his debt and costs out of any property of either of the other defendants. The solicitor of Jonas Nestle must serve a new copy of his answer upon the solicitors of the complainants; and they must be at liberty to file a replication to that answer within the usual time for replying. And when the cause is in readiness for hearing between the complainant and Jonas Nestle, it is to be brought to a hearing, as to him, in the usual way; so that the court may make such decree between him and the complainant as may be just. And as between those parties neither is to have costs as against the other upon this application.

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HALL vs. FISHER.

In what cases sworn bills may be amended, although the amendments contradict material allegations in the original bill.

THIS was an application to amend a sworn bill. The facts, as stated in the present bill, and the general object of the suit, appear in the report of the case when it was before the chancellor upon the application to dissolve the injunction. (See *Hall v. Fisher*, 1 Barb. Ch. Rep. 53.)

*G. A. Simmons*, for the complainant.

*A. C. Hand*, for the defendants.

THE CHANCELLOR. The amendments proposed appear to be material, and, indeed, essential; although some of them are inconsistent with what was sworn to in the original bill. The

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affidavit of the complainant's solicitor fully explains how one of the material mistakes occurred in drawing the bill. The one-fourth of the ore bed in dispute was originally conveyed to Joseph Hall and Ephraim Hall his son; against both of whom a judgment was recovered in the supreme court. After that judgment became a lien upon the land, Ephraim Hall conveyed his interest in the land to his brother Eliphalet Hall; the only complainant in this suit. The premises were subsequently sold by the sheriff on an execution upon that judgment. And Eliphalet Hall, who then owned one-eighth, redeemed, or attempted to redeem, the premises from Fisher's purchase at the sheriff's sale, for himself and his father Joseph Hall, who then owned another eighth. And, both of them supposing the redemption to be effectual, Joseph Hall, the father, conveyed his interest in the premises to his son Ephraim, the former owner of the other eighth; and not to Eliphalet, as was erroneously stated and sworn to in the bill. The object of a portion of the amendments is to correct this error in the bill, and to make Ephraim Hall a co-complainant in the suit.

The solicitor states that all the papers were before him when he drew the bill for the complainant; but that, through inadvertence and the similarity of names, he got the impression that Joseph Hall, the father, conveyed to his son Eliphalet; and that the latter was the sole owner of the premises originally conveyed by Fisher. He therefore drew the bill accordingly; stating that Joseph Hall conveyed to Eliphalet Hall. As there was nothing else in the bill to call the complainant's attention to the substitution of Eliphalet Hall for Ephraim Hall, it would have easily occurred that in the reading of the bill over hastily, he might not discover the mistake; and therefore swore to it as a matter of course, believing it to be entirely right. It is, therefore, a case in which an amendment should be allowed, in furtherance of justice; although it is an amendment to a bill upon which an injunction was once allowed, and the amendment contradicts a material allegation which was sworn to by the complainant.

Some of the other amendments asked for, relate to the direc



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tions given to the complainant, by the deputy sheriff, and to the acts and agency of Cuyler, the clerk, in the reception of the redemption money. The amendments in that case do not conflict with any thing that is sworn to in the bill as to that transaction, but are merely in addition thereto; giving a more extended statement of what took place on that occasion; with an averment that it is doubtful whether the amount received by Cuyler, as the agent of the sheriff for that purpose, was or was not the full amount of the redemption money required by law to be paid. The amendments are sworn to, and it appears to be reasonable to allow them to be made. For they may be essential to the setting aside of the sheriff's deed as a cloud upon the complainant's title; the circumstances of the case depending upon parol evidence only. It may be proper to say, however, that if the facts are proved, as now sworn to by the complainant, the redemption was probably valid; even if Cuyler made a mistake of a few cents in computing the interest, so that he gave back too much change to the complainant, and did not retain the full amount which he should have received. For if Cuyler was the agent of the sheriff to make the computation of interest, as well as to receive and hold the redemption money for him, the plaintiff may have a perfect defence to any suit at law which may be brought against him to recover the possession of the property. The other amendments may also be material, in equity, to show that the acts of the defendants were inequitable and unconscientious, if the defendants at that time meant to insist that the premises were not legally redeemed.

The amendments must therefore be allowed. But the defendants are entitled to any benefits which may be derived from the sworn bill on file. The amendments must, therefore, be made by incorporating them into the draft of the original bill, and en grossing and filing the same as a separate amended bill, after such amended bill shall have been verified by the oath of Eliphalet Hall, who is the sole complainant in the original bill. The amended bill must be filed and served within forty days after this decision; and the complainant, as a condition of, and before he is permitted to make such amendment, must pay to

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Rexford v. Widger.

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the defendants, or to their solicitor, \$15, for the costs of opposing the two motions to amend.

And if the defendants elect to abandon their answer to the original bill, and to file a new answer to the whole bill as amended, the complainant must pay the costs of the former answer within thirty days after service of the taxed bill of such costs. But the non-payment of the last mentioned costs is not to interfere with the amendment; which costs are to be collected by a precept, in the usual way, if they are not paid.

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## REXFORD and BIRDSALL vs. WIDGER and others.

[Affirmed, 2 N. Y. 131.]

A subsequent mortgagee is not a borrower within the meaning of the usury laws, so as to authorize him to file a bill to set aside a previous security, given by the mortgagor, on the ground that it is usurious, without paying or offering to pay the amount actually due or advanced, for which such previous security was given.

THIS was an appeal, by the defendants, from a decree of the late vice chancellor of the sixth circuit, setting aside two judgments by confession, in favor of the defendants Jonathan G. Widger and Betsey his wife against Green Randall, on the ground of usury. The judgments were given in November, 1839, and were docketed so as to become liens upon the real estate of Randall in Binghamton, in the county of Broome. The complainants were subsequent mortgagees of the lands in Binghamton; and filed their bill against the judgment creditors and the sheriff, to restrain them from selling the mortgaged premises upon the judgments; and to set aside the judgments for usury.

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Rexford v. Widger.

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*II Vander Lyn, for the appellants.*

*A. Birdsall, for the respondents.*

THE CHANCELLOR. It is a fatal objection to the bill of the complainants that they did not pay or offer to pay the amount of the moneys actually due, and which were included in the two judgments, with the legal interest thereon. It is not necessary, therefore, that I should examine the various other questions arising in this cause. The complainants are not borrowers within the meaning of the revised statutes, and the act of 1837, as recently expounded by the court for the correction of errors, in the case of *Post v. The Bank of Utica*, (7 Hill's Rep. 391.) It was there decided that a subsequent grantee of the premises covered by a mortgage alleged to be usurious, or a purchaser at a sheriff's sale under a subsequent judgment, was not a borrower. And that consequently he could not file a bill in this court to be relieved against the usurious incumbrance upon the premises, without paying or offering to pay what was equitably due. The decree in this case, therefore, cannot be sustained. For a subsequent mortgagee is not a borrower, within the meaning of the usury laws.

The decree of the vice chancellor must be reversed, and the bill of the complainants must be dismissed with costs, and the injunction dissolved. But the decree of dismissal must be without prejudice to the rights of the complainants, if they have any, to contest the validity of the judgments in any other suit or proceeding.

## In the matter of the CROTON INSURANCE COMPANY

The officers of an insolvent corporation are not entitled to have their salaries paid in full, in preference to the debts of other creditors. They are only entitled to be paid their ratable proportion of the assets of the company as between them and other creditors.

The receiver of an insolvent corporation may, upon application to the court, be authorized to compromise disputed and doubtful claims against the company, by the allowance of so much of such claims as he may deem just and equitable.

He may also be authorized, in any case where he may deem it expedient, and for the interest of the creditors and stockholders of the company to do so, to compromise with debtors of the corporation who are unable to pay in full; upon the receipt of such part of the debts due from them as he shall deem reasonable and for the best interests of such creditors and stockholders of the company.

Such receiver will not be authorized to re-insure for risks already assumed by the company, and to pay the new premium out of the assets of the company. But his proper course is to refund the unearned portion of the premiums received, where the assured are willing to do so, and let them re-insure for themselves.

THIS case came before the chancellor on an application by the receiver of the Croton Insurance Company, an insolvent corporation, for leave to re-insure the risks which the corporation had assumed; for leave to compromise claims against the corporation; and for leave to pay the officers of the company their salaries in full.

*J. N. Taylor*, for the petitioner.

THE CHANCELLOR. In the case of *Bruyn v. The Receiver of the Middle District Bank*, (1 *Paige's Rep.* 584,) this court decided that the cashier of an insolvent bank had no lien upon the funds of the bank for the payment of the arrears of his salary; and that he was not entitled to a preference in payment over other creditors. In this case the officers of the insolvent institution are not entitled to any preference in payment over other creditors. The receiver is therefore to allow them the amounts due them for their salaries up to the time of his appointment only; as debts to be paid ratably with other creditors. The one against whom the receiver holds a note, can however

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In the matter of the Croton Insurance Company.

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be credited the amount due to him for his salary, as an offset ; to be applied in part payment of his note.

The receiver is also to be allowed to compromise disputed and doubtful claims against the company, by the allowance of so much of such claims as he may deem just and equitable. And he is also to be at liberty to submit any such claims to arbitration ; as provided for in the statute, under which he was appointed. The court will also give him a general power, in any case where he may deem it expedient and for the interest of the creditors and stockholders of the company to do so, to compromise with debtors of the corporation who are unable to pay in full ; upon the receipt of such part of the debts due from them as he shall deem reasonable and for the best interests of such creditors and stockholders of the company.

It does not appear to be proper, however, to authorize the receiver to re-insure for risks already assumed by the company. The statute authorizes the receiver to cancel such policies, with the assent of the assured ; and to refund to the assured so much of the premiums which may have been paid as shall be in proportion to the period the policy has to run at the time of such cancelment. (2 R. S. 470, §§ 75, 77.) And if those who have insured with an insolvent corporation are not willing to assume the risk of re-insuring for themselves on those terms, which they undoubtedly do at the same rate which the receiver would have to pay for a re-insurance of the risk which the company had assumed, for the same period, they must take their chance of a ratable dividend with the other creditors in case of a loss. The part of the application which asks for leave to re-insure, and so much thereof as asks permission to pay the officers of the insolvent company more than their ratable proportion of the assets of the company, as between them and other creditors, must be denied.

**PLANCK vs. SCHERMERHORN and others.**

An assignment by a debtor which attempts to appropriate a part of his property for the use of his wife, to satisfy an alleged claim in her favor which she could not have recovered from the assignor by any suit or proceeding, either at law or in equity, is fraudulent and void as against the creditors of the assignor; if the property of such assignor, at the time of the assignment, was not sufficient to pay all his other debts, and the alleged claim of his wife also, or so much of it as was attempted to be secured by the assignment.

If a debtor has ample property to pay all his debts, it is a fraud upon his creditors for him to assign all his property to an assignee, and to authorize such assignee to employ the proceeds thereof in defending suits which may be brought against the assignor by his creditors, to recover their several debts; the effect of such assignment being to delay his creditors in the collection of their debt.

It is equally fraudulent, under the statute, for a debtor to make an assignment of his property for the purpose of delaying creditors in the collection of their debts, as it is to assign it in order to defeat the final collection of such debts.

A clause in an assignment, empowering the assignee to mortgage, or lease, the assigned estate, is void as against creditors. So also, is a reservation of the right of the assignor to name the successor of the assignee, in case such assignee should wish to resign the trust.

THIS was an application, on the part of the complainant in a creditor's suit, for a receiver of the property of the defendant Isaac M. Schermerhorn, the judgment debtor of the complainant; and also to extend the receivership to certain property assigned by the judgment debtor to the defendant Jacob M. Schermerhorn.

*J. Rhoades*, for the complainant.

*I. Harris*, for the defendants.

THE CHANCELLOR. The complainant is entitled to a receivership as to the judgment debtor, as a matter of course; and it is granted accordingly.

From the affidavits it appears that at the time of the assignment of 1842, the assignor had property sufficient to pay all his debts; exclusive of the property assigned for the benefit of his wife. And though the money he had received on account of

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Planck v. Schermerhorn.

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the estate of his wife's father belonged to him, so far that he could not legally give it to her, or to a trustee for her use, at the expense of his creditors, still he had a right to dispose of it in trust for her benefit, with or without a pecuniary consideration; so long as he retained in his own hands an ample fund for the payment of all his debts. Upon the facts as they appear in these papers, therefore, the receivership as to the property embraced in the assignment of April, 1842, must be denied.

No receivership is asked for as to the farm assigned to McGoffin. It is not necessary, therefore, to inquire as to the validity of the assignment of that part of the property. But the assignment of 1844, to Jacob M. Schermerhorn, of all the residue of the property of the assignor, appears to be invalid for several reasons. In the first place it attempts to appropriate a part of the assignee's property for the use of his wife, to satisfy an alleged claim, in her favor, which she could not have recovered from the assignor by any suit, or proceeding, either at law or in equity. For that reason, if the property of the assignor, at the time of that assignment, was not sufficient to pay all his other debts and this alleged claim also, or so much of it as was attempted to be secured by the assignment, then such assignment was a fraud upon the creditors; inasmuch as it would deprive them of the power of ever obtaining payment of the whole of their debts. On the contrary, if the defendant had ample property to pay all his debts, including the debt due to this complainant, then it was a fraud upon his creditors to assign all his property to an assignee, and to authorize such assignee to employ the proceeds thereof in defending suits which might be brought against the assignor, by his creditors, to recover their several debts. For it is equally fraudulent, under the statute, to make an assignment of property for the purpose of delaying creditors in the collection of their debts, as it is to assign it for the purpose of defeating the final collection of such debts. And this provision of the assignment could have been inserted for no other reason than to enable the assignee to leave the property in the possession or under the control of the assignor; and thus to defend suits which might be brought against the latter to

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Planck v. Schermerhorn.

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obtain possession of the assigned property, and retain the expenses of such defences out of the proceeds of such property.

The creditors are entitled to payment in cash when their debts become due. And where a man has ample means to pay all his debts in cash, as they become due, there seems to be no reason for making a general assignment, and giving preferences, except for the purpose of delaying the creditors in the assertion of their legal rights.

The power in this assignment to lease or mortgage the estate assigned is also void; and the reservation of the right of the assignee to name the successor of the trustee, in case the trustee named in the assignment wishes to resign the trust, is also objectionable. For it might deprive the court of the power to remove the trustee and appoint another in his place, upon the application of the creditors. For if a creditor should make an application for that purpose, the present trustee, with the assent of the assignor, might immediately substitute another in his place, of the assignor's own selection; and so on from time to time, as often as the trustee should be liable to removal by neglect of his duty to the creditors.

The receivership as to the assigned property, other than that embraced in the assignment of 1842 and in the assignment to McGoffin, must therefore be granted; unless the defendants Isaac M. and Jacob M. Schermerhorn, or one of them, shall within thirty days after service of a copy of the order to be entered herein, give a bond with two sufficient sureties, in double the amount of the complainant's judgment, with interest thereon; conditioned for the payment of the complainant's debt and costs and the costs of this suit, if such complainant succeeds in obtaining a decree setting aside the assignment of 1844, to Jacob M. Schermerhorn, as fraudulent and void against the creditors of the assignor.



**SWEET and TITUS vs. VAN WYCK and SWEET.**

Where a bond and mortgage are assigned as security for a debt, a subsequent assignee takes the same subject to the right of the original assignor, to redeem the securities, upon paying the amount of the loan for which such bond and mortgage were pledged, with interest.

Form and requisites of a decree for the redemption of mortgaged premises, where the mortgage has been assigned by the mortgagee to a third person as security for a debt.

THIS was an appeal by Van Wyck, one of the defendants, from a decree of the vice chancellor of the second circuit, allowing the redemption of a mortgage which had been originally assigned to the defendant S. Sweet as security for a debt.

*H. Harris*, for the appellant.

*J. Rhoades*, for the complainants.

*C. Stevens*, for the defendant S. Sweet.

**THE CHANCELLOR.** Whatever may have been the agreement between these defendants, S. Sweet could not convey any greater interest in the bond and mortgage than was vested in himself. Van Wyck, therefore, took the bond and mortgage, under the assignment to him, subject to the right of Sarles, or of the complainants, as his assignees, to redeem the same, upon paying the amount of the loan for which such bond and mortgage were pledged by Sarles, with the interest thereon. The decree is therefore right as between the complainants and the appellant Van Wyck; except that in drawing up the decree the complainants' solicitor has neglected to insert the usual and proper clause fixing the time within which the complainants should redeem, or be barred of their right.

The decree was erroneous, however, as between the defendants; for the complainants had nothing to do with the question whether the defendant S. Sweet was or was not bound to guaranty the payment of the whole amount of the bond and

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Sweet v. Van Wyck.

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mortgage, to Van Wyck; and to indemnify the latter for the costs of his unjustifiable resistance to the right of the complainant to redeem. The bill, therefore, should have been simply dismissed as to S. Sweet, and without prejudice to the rights of the defendants, as between themselves, in any future litigation. And although I am perfectly satisfied that upon the facts as they now appear Van Wyck has no claim, either legal or equitable, against S. Sweet, on account of the costs of this litigation or for the surplus of the bond and mortgage beyond the amount of Sweet's interest therein as mortgagee thereof, the part of the decree settling these rights in this suit, where they could not be properly litigated and decided, must be reversed. But it must be without costs to either party.

It appears by the master's report that the appellant has been in the receipt of the interest, on the bond and mortgage assigned to him, during the pendency of this suit. It may be necessary to have a further reference, therefore, to ascertain what is now due him, before the complainants are bound to tender the amount which is to be paid by them to redeem; unless the parties can agree as to the amount due. The decree must accordingly be modified so as to direct that it be referred to a master, to ascertain and report what is now due to the defendant Van Wyck on account of the debt for which the bond and mortgage were assigned by Sarles to the defendant Sweet. The master must take the former report as the basis of what was due at the date of that report, and must deduct from the principal and interest of the sum then reported due all sums which the defendant Van Wyck has received since that time on account of principal or interest of the bond and mortgage: whether he received interest at the rate of six or seven per cent. And the decree must prohibit the defendant Van Wyck from receiving any further sums on the bond and mortgage, unless the complainants shall neglect to redeem or to tender the amount necessary for that purpose as hereafter directed. Upon the coming in and confirmation of the master's report of the amount due to Van Wyck, and after notice to the complainants that the report has become absolute, they must, within six

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Sweet v. Van Wyck.

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months, pay to the defendant Van Wyck, or to his solicitor, the amount reported due, with interest thereon from the date of such new report ; deducting therefrom the costs of the complainants, and interest thereon from the time when they shall have been taxed. And the defendant Van Wyck, upon payment or tender of the amount due, must reassign the bond and mortgage to the complainants. If upon the coming in of the master's report it appears that the defendant Van Wyck has been overpaid, or that there is not enough due to him to satisfy the costs of the complainants, he is to reassign the bond and mortgage immediately upon the taxation of the costs, without any payment or tender to him ; and he must, in that case, pay to the complainants whatever may appear to be due to them for such over-payment, and for costs, or for the balance of the costs beyond what may be reported due to the defendant Van Wyck.

Neither party is to have costs against the other upon this appeal. If a reference is necessary to ascertain the amount, the appellant is to be at liberty to prosecute the reference ; so as to prevent any unnecessary delay. But if the parties can agree upon the amount actually due, it may be inserted in the decree, so as to save the expense of a reference. And if a reference is ordered, all the necessary consequential directions are to be inserted in the decree ; so that the cause may not again be brought before the court, unless there should be exceptions to the master's report which it will be necessary for the new supreme court to pass upon.

## STRANGE vs. LONGLEY.

It is not necessary for the assignee of a judgment to issue a new execution there on before he can file a creditor's bill against the defendant.

It is a good objection to an application for the appointment of a receiver in a creditor's suit, that no execution has been issued to the county in which the judgment debtor resided.

Where the complainant in a creditor's suit has sworn positively, in his bill, that an execution has been issued to the county in which the judgment debtor resided, an injunction granted in such suit will not be dissolved, upon a simple affidavit contradicting that fact. The defendant must put in his answer, denying the allegation, and then move to dissolve the injunction on bill and answer.

In the case of an execution issued before the statute was passed, requiring executions to be made returnable sixty days after the delivery thereof to the sheriff, a creditor's bill, founded on such execution, should state at what time the execution was made returnable.

Where the complainant in a creditor's suit claims the whole of the debt and costs included in a judgment, as the assignee of such judgment, he must show a valid assignment entitling him to the costs as well as to the debt, or the original judgment creditor, to whom the costs belong, must be joined with him in the suit, or must be made a party to the same as one of the defendants therein.

Where it does not appear from such bill that the whole judgment has been assigned to the complainant, but it is merely stated that the obligations upon which the judgment was recovered, have been assigned to him, the bill is defective.

A general averment, in such a bill, that the defendant is primarily liable for the payment of the obligations upon which the judgment was recovered, is too indefinite to excuse the complainant from issuing an execution to the county where the other judgment debtors reside; or making them parties to the suit.

THIS case came before the chancellor upon an application to dissolve an injunction on the bill and opposing affidavits.

*O. L. Barbour*, for the complainant.

*J. Rhoades*, for the defendant.

THE CHANCELLOR. The objection that it is necessary for an assignee of the judgment to issue a new execution before he can file a creditor's bill is not valid. That question was decided the other way in *Gleason v. Gage*, (7 Paige's Rep. 121,) where the decision of the vice chancellor in *Wakeman v.*

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Strange v. Longley.

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*Russell*, (1 *Edw. Ch. Rep.* 509,) was overruled. The affidavit that the execution was not issued to the county where the defendant resided, would constitute a good objection to an application to appoint a receiver of the property of the judgment debtor. But as the complainant has sworn positively, in his bill, that the defendant resided in the county of Erie when the execution was issued, in January, 1839, the injunction cannot be dissolved upon a simple affidavit contradicting that fact; but the defendant must put in his answer denying this material allegation in the bill, and then move to dissolve on bill and answer.

The bill is defective, however, in not stating when the execution was returnable; as such execution was issued before the statute, requiring the execution to be made returnable sixty days after its delivery to the sheriff, was passed. The bill merely states that the sheriff was directed to have the money before the justices of the supreme court at *Geneva* on the return day of the writ; without stating any where in the bill when that return day was. And as there was no term of the court held at *Geneva*, it is doubtful when or where the court was held at which the execution was in fact returnable.

The objection to the bill is also well taken, that it does not appear that the whole judgment was assigned to the complainant, but only the obligations upon which the judgment was recovered, and for the payment of which *obligations* the bill states that the defendant in this suit is primarily liable. As the complainant claims the whole of the debt and costs included in the judgment, he must show a valid assignment entitling him to both; or the original judgment creditor, to whom the costs belong, must be joined with him in the suit; or be made a party to the same.

The general averment, that the defendant is primarily liable for the payment of the obligations upon which the judgment was recovered, is also too indefinite to excuse the complainant from issuing an execution to the county where the other judgment debtors resided, or from making them parties to the suit. This defendant may have become primarily liable, by some agreement

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Fellows v. Harrington.

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made between him and his co-defendants in that suit since the recovery of the judgment; whereby he had agreed to pay the debt exclusive of the costs. If the defendant in this suit was in fact, the principal debtor in the judgment, and was bound in equity to pay the whole debt and costs, as between him and the other parties against whom such judgment was recovered, the complainant should have briefly stated the facts upon which such primary liability of the defendant rested; so that the court could see whether the complainant was not under a mistake in point of law in supposing that Longley was in fact primarily liable. For instance; if Longley was the drawer of a note, on which the other defendants in the judgment were merely endorsers, that fact should have been stated in the bill, so as to give the defendant an opportunity to put the fact in issue, in case it was material.

Upon the allegations in the bill as they now stand, the complainant is not entitled to retain his injunction. It must therefore be dissolved.

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FELLOWS vs. HARRINGTON and others.

[Distinguished, 3 Hun 249.]

Where the condition of a bond, dated December 14, 1833, was that the obligor should pay to the obligee the sum of \$3200, to be paid in manner following, viz. \$1000 on the first of April next, the remainder in four annual payments thereafter, of \$550 each, interest annually; *Held* that the obligee was not entitled to any interest during the interval between the date of the bond and the first of April, 1834, when the first payment was to be made.

THIS was an appeal, by the complainant, from an order of the vice chancellor of the third circuit, disallowing an exception to a report upon a reference to compute the amount due upon the complainant's mortgage. On the 14th of December, 1833, the complainant conveyed the mortgaged premises to the defendant H Harrington for the consideration of \$3200; but

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Fellows v. Harrington.

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by the terms of the conveyance was to retain possession until the first of April then next. And on the day of the date of the deed Harrington gave back to the complainant the bond and mortgage in question; the condition of which bond was that the obligor should pay to the obligee the "sum of \$3200, to be paid in manner following, viz: one thousand dollars on the first of April next, the remainder in four annual payments thereafter, of five hundred, and fifty dollars each, interest annually."

Upon the reference the complainant's counsel insisted that by the terms of the bond he was entitled to annual interest from the date of the bond and mortgage. But that claim was disallowed, and the annual interest was only allowed from the first of April, 1834; when the first payment of \$1000 became payable, and was paid. The vice chancellor upon an exception to the report sustained the decision, and overruled the exception.

*J. Koon*, for the appellant.

*W. H. Tobey*, for the respondents.

THE CHANCELLOR. Upon the face of the bond, independent of the presumption arising from the production of the deed showing when the interest would probably be made to commence, the decision appealed from is undoubtedly correct. The natural reading of the bond is that no interest is to be paid upon the first \$1000, before it becomes payable on the first of April, 1834, and that the other \$2200 are to be paid in four equal annual payments from that time, with the interest annually from the same time. And upon looking at the bond, with the erasure as noted in the attestation clause, it is perfectly clear that the parties so understood the condition of the bond at the time it was executed. For in the bond, as originally drawn, the condition was to pay \$3200, "one thousand dollars on the first of April next, *with interest on the whole*; the remainder in four annual payments thereafter of \$550 each, inter

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est annually." It is evident therefore that the *annual interest* in the bond, as it was originally drawn, only related to the \$2200, and was to commence on the first of April, 1834, and to be payable at the same time as the instalments of principal. And the parties having intentionally stricken out the words "with interest on the whole," which would have given to the mortgagee interest on the \$3200 between the 14th of December, 1833, and the first of April, 1834, the mortgagee is not entitled to any interest during that period of time.

The order appealed from must, therefore, be affirmed with costs.



## APPENDIX.

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### **Proceedings of the Bar, &c. upon the termination of the Court of Chancery and of the former Supreme Court, and the retirement of the Judges.**

THE new constitution of this state, which went into operation on the first day of January, 1847, abolished the court of chancery and the supreme court, from and after the first Monday of July, 1847, but gave to the chancellor and the justices of the supreme court, respectively, power to hear and determine such suits and proceedings as should be ready on that day for hearing or decision; and provided a compensation for their services until the first day of July, 1848, or until all such suits and proceedings should be sooner heard and determined.

In pursuance of these provisions of the constitution, the court of chancery of the state of New-York ceased to have a separate existence; its powers and functions being transferred to the new supreme court having general jurisdiction in law and equity. And Chancellor Walworth, on the 30th day of June, 1848, retired from the bench, which he had occupied with distinguished ability for more than twenty years; leaving undecided only eight of the numerous causes and motions which had been argued before him, or submitted to him for his decision, during his continuance in office.

In anticipation of the termination of these courts, and the retirement of the chancellor and the judges from the bench, the following proceedings and correspondence occurred.

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At a meeting of the Members of the Bar in attendance upon the supreme court at its adjournment, on the 18th day of May, 1848, on

motion of Mr. Kirkland of Utica, the Hon. A. L. Jordan, attorney general of the state, was called to the chair, and H. R. Selden of Rochester was appointed secretary.

On motion of Mr. Taber of Albany, it was

Resolved, That a committee of five be appointed to prepare resolutions expressive of the views of the meeting.

The Chair appointed Messrs. Taber of Albany, Kirkland of Utica, Reynolds of Albany, and Silliman and Noyes of New-York.

The committee withdrew, and after a short absence reported the following resolutions, which were unanimously adopted.

Resolved, That in taking our final leave of the original supreme court of this state, a tribunal which has existed without any essential change for more than a century and a half, and during this large portion of our whole colonial and national existence, has, by its wise and upright decisions, commanded the unwavering confidence of the community, and moulded the common law into a happy conformity to our free institutions—a tribunal never tarnished by the breath of suspicion, which has embodied some of the most illustrious names afforded by judicial history, and whose published decisions for the last half century have exhibited a body of municipal law honored at home and respected every where—we are impressed with a feeling of regret, mitigated only by the hope that the tribunal which succeeds it will pursue a course equally honorable and useful.

Resolved, That the present and recent justices of this court, whose last term for hearing arguments has now closed, have merited and secured the undiminished confidence of the public; and that by their diligent research, the soundness and accuracy of their opinions, and their uniform kindness and courtesy to the profession, they are entitled to our highest respect and regard, and are followed by our cordial wishes for their individual prosperity and happiness.

Resolved, That we deem the close of our former judiciary system a fitting occasion for the expression of our respect and regard for the eminent jurist who for so many years past has discharged the laborious and responsible duties of Chancellor of this state, and whose last term for hearing arguments has also recently ended. That the published volumes of his reports evince a degree of acuteness and discrimination, love of truth, sound morality, and thorough legal research, unsurpassed by any others, and honorable alike to himself and to the jurisprudence of our state.

Resolved, That the chairman and secretary cause the proceedings of this meeting to be published, and that they also furnish to each of the judges of the supreme court, and to the chancellor, a copy of its proceedings.

A. L. JORDAN, Chairman.

H. R. SELDEN, Secretary.

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*New-York, May 19, 1848.*

Hon. R. HYDE WALWORTH,

Dear Sir : It affords us pleasure to be the medium of communicating to you the foregoing resolutions ; and at the same time to beg that you will accept the assurance of our individual regard.

A. L. JORDAN.

H. R. SELDEN.

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*Saratoga Springs, June 19, 1848.*

GENTLEMEN,

Permit me through you to tender to the gentlemen of the bar my most grateful acknowledgments for their kind and complimentary resolution, which you were instructed to communicate to me, and which I received a few days since.

The intimate and very pleasant relations which have existed between the members of the bar of this state and myself, since I took a seat upon the bench, and the uniform support and kindness I have received from them during the judicial labors of more than a quarter of a century, will ever be remembered with feelings of the deepest gratitude. If in the discharge of my official duties as chancellor any judicial reputation has been acquired, I am mainly indebted for it to the great aid I have constantly received from the profound researches and the able discussions of a most enlightened and intelligent bar ; a bar composed of gentlemen whose legal learning is at least equal to that of the bar of any other state or country, and who for love of truth and justice are not surpassed by the members of any other profession, or of any class of society.

The very flattering commendation of my judicial services, by this resolution of my professional brethren who have witnessed the manner in which those services have been performed, and who can best appreciate their value, is most gratifying to my feelings ; as it is the strongest assurance I can receive that my honest endeavors to discharge the high trust, committed to me by my fellow citizens, in such a manner as to benefit those from whom I received it, have not wholly failed.

Have the goodness to communicate to the legal gentlemen whom you represent, my best wishes for their prosperity and happiness, individually as well as collectively. May they continue to maintain that love of truth and justice which is so essential to their usefulness in the profession; and may they all possess that high Christian morality and faith which is necessary to solace them in a dying hour. And accept for yourselves, gentlemen, the assurance of my sincere respect and esteem.

R. HYDE WALWORTH

Messrs. A. L. JORDAN and H. R. SELDEN, Chairman and

Secretary of meeting of the members of the bar.

# INDEX

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## A

### ACKNOWLEDGMENT.

*See* WITNESS, 5.

### ACCORD AND SATISFACTION.

An agreement, by a creditor, to accept a part of an admitted debt in satisfaction of the whole, without any other consideration, is not sufficient to discharge the debtor from the payment of the residue. But if the debtor, in addition to the agreement to pay part of the debt, gives to the creditor any thing which in judgment of law can be considered a benefit to him, and the creditor accepts it as a satisfaction of the whole liability of the debtor, it is a good accord and satisfaction to release the debtor from further liability. *Douglass v. White*, 621

### ACCOUNT.

1. A bill, by persons claiming to be next of kin of a testator, against the executors, for an account, making persons claiming an interest in the personal estate, as next of kin, parties defendants, but alleging that the latter have no right, title, or interest in the estate, either as next of kin or otherwise, is demurrable, as to them. *Muir v. Trustees of the Leake and Watts Orphan House*, 477

2. Under the provisions of the revised statutes no one can be liable to ac-

count to the next of kin, as an executor of his own wrong. Where persons have received and disposed of the property of a testator, without having been duly appointed his executors, or duly authorized to act as such, they are liable to his personal representatives, whenever such representatives shall have been appointed; but not to persons claiming to be next of kin of the decedent merely. *ib*

### ACCUMULATIONS.

*See* HUSBAND AND WIFE, 10, 11.  
TRUSTS AND TRUSTEES, 1, 2.

### ACTION.

*See* HUSBAND AND WIFE, 1, 3.  
LITERARY PROPERTY, 1.

### ADMISSIONS.

*See* PRESUMPTIONS, 2.

### ADULTERY.

*See* ALIMONY.

### AFFIDAVIT.

*See* PRACTICE, 2.  
[659]

## AGREEMENT.

1. The principle upon which courts of equity hold that a part performance of a parol agreement respecting land is sufficient to take a case out of the statute of frauds, is that a party who has permitted another to perform acts on the faith of such an agreement, shall not be allowed to insist that the agreement was invalid because it was not in writing, and that he is entitled to treat those acts as if the agreement in compliance with which they were performed had not been made. *Lovvry v. Tew*, 407
2. Taking possession of land under a parol agreement, and in compliance with the provisions of such agreement, accompanied by other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute of frauds. *ib*
3. Although a party who has gone into possession of premises under an agreement to purchase the same is, at law, a tenant at will to the holder of the legal title, yet if he is in under a written agreement, made by the owner, to sell and convey the premises to him, or under a parol agreement which has been so far consummated as to entitle him to a specific performance, he is in equity considered the owner of that title for which he contracted, and which the vendor is able to give him. And if that title is an equity of redemption, he has the same claim to redeem, except as against bona fide purchasers without notice of his equitable rights, as if the equity of redemption had been conveyed to him at the time when his equitable rights accrued under the contract. *ib*
4. In May, 1825, L. and wife leased to H. a piece of land, in the city of New-York, for the term of 21 years. The lease contained a covenant that at the end of the term the premises and the improvements thereon, should be separately valued and appraised, by sworn appraisers; and that in case the lessors should not, within ten days after the appraisement, elect to take the improvements at their appraised value, then the lessors would sell and convey the premises to the lessee, or his assigns, at the price the same should be appraised or valued

at. H. assigned this lease to H. and M.; who afterwards assigned the same to The Sterling Co. In January, 1827, an agreement was made between the lessors and The Sterling Co., by which the former covenanted with the latter that in case The Sterling Co. should underlet or assign any lot or lots upon which no building had already been erected, such lots respectively to be 25 feet in front and 100 feet in depth, and if the under lessee or assignee of such lots respectively should actually build, or cause to be built, on each of the lots so assigned, a two story dwelling house or tenement, with a brick front, then and in such case each and every lot so underlet or assigned, and which should have such dwelling house or tenement erected thereon, should be chargeable with the annual rent of \$60 only, as its proportion of the rent reserved in the original lease; and that such under lessee or assignee, at the termination of the original lease, should, in respect to the improvements on such lot, be entitled to the like appraisement and provisions as were in that behalf specified in the original lease. The Sterling Co. subsequently divided the land into lots of 25 feet in front and rear, and 100 feet in depth, and leased two of those lots to B. for the residue of the term, by separate leases; B. covenanting with The Sterling Co. to pay the rent and the taxes and assessments, and to build upon each of the lots a house of at least two stories in height, with a brick front. And The Sterling Co. covenanted with B. that, at the end of the term, he should, in respect to the improvements on those lots, be entitled to the like privileges, &c. as were specified in the original lease. The Sterling Co. subsequently re-assigned the original lease to H. & M.; and by divers mesne assignments the same came to, and was vested in, V. at the expiration of the term. B., the lessee of the two lots, instead of building a two story house with a brick front on each lot divided the two lots into five; each lot or subdivision being 20 feet in front by 50 feet deep, and fronting on another street. Upon the corner lot there was erected by B. or his assigns, a two story house with a brick front. Frame buildings were erected upon three of the other lots, and a feed-store of brick upon the fourth lot. These leases to B. afterwards came by assignment to O. the complainant. Shortly before the termination of the original lease, L. and

wife agreed with V, the then owner thereof, to pay him for the buildings upon the demised premises, and procured from him an assignment of all his interest in the lease and leasehold premises to their son M. L. Upon the expiration of the lease L. and wife claimed that the complainant was not entitled to pay for the buildings so erected on the five subdivisions of the two lots leased by The Sterling Co. to B., because they were not made in pursuance of the agreement with The Sterling Co.; and refused to join in the appointment of appraisers of those two lots and the buildings thereon. On a bill filed by the assignee of B. against L. and wife, to restrain the prosecution of suits at law brought against him and his tenants, to recover the possession of the two lots leased to B., and for a specific performance; *Held* that the buildings erected upon the lots leased to B. were not such as were contemplated in the agreement between L. and wife and The Sterling Co., or as B. covenanted to build. That although it was not required that the building should cover the whole front of the lot, 25 feet in width, yet that the erection of such a house as was described in the agreement, if built partly on one lot and partly on another, was not a compliance with the terms of that agreement, or with the covenant in the leases to B., as to either lot. And that the complainant, as the assignee of B., was not entitled to any benefit under the agreement of January, 1827; the covenant in that agreement, giving to the sub-lessees, or assignees of particular lots the right to an independent appraisal of their improvements, being limited to such lots as should have been improved in the manner therein contemplated. *Ostrander v. Livingston*, 416

- 5 *Held also*, that the rights of the complainant, in reference to improvements, were no greater than they would have been had the agreement of January, 1827, not been made. And that under the covenant in the original lease, the value of the whole leasehold premises, and the value of the whole improvements, were to be separately estimated; that the covenant giving the lessors the privilege of taking all the buildings or improvements at such valuation, or of conveying the whole of the premises demised, upon being paid the price at which the whole premises, exclusive of the improvements, were valued, at

their election, was in its nature indivisible. And that if the entire interest of the lessee in distinct parcels of the demised premises had been assigned to different individuals, all who were interested in the performance of the covenants, or in the different parcels of the demised premises, must unite in the appraisal; and in the purchase of the whole premises, if the lessors elected to convey the same at the appraisal. *ib*

6. *Held further*, that the effect of the agreement of January, 1827, was the same as if the particular lots which were leased or assigned, and built upon in conformity to the terms of that agreement, had formed no part of the premises originally demised to H. *ib*
7. And the bill showing that several other lots of 25 feet by 100 feet, into which the demised premises were subdivided, were sublet to different persons, but not stating who such persons were, or whether any buildings were erected on their respective lots, and if so, whether they were erected in conformity to the provisions of the agreement of 1827, also *Held* that no relief could be granted upon the bill of the complainant, as framed, even if he had made out a case entitling him to equitable relief in other respects. And that M. L., the assignee of the lease and of a part of the premises originally demised, so far as related to that covenant, was a necessary party to any bill for a specific performance thereof by the lessors; even though the consideration of the assignment of the lease to him was in fact paid by L. and wife, the original lessors. *ib*

## ALIENS.

1. It is a principle of the common law, that an alien can neither inherit lands himself, from a person who is not an alien, nor transmit lands by descent to any other person. *Banks v. Walker*, 438
2. Nor, by the common law, could a natural born subject or citizen transmit lands by descent to another mediately, through the blood of an alien. Thus in the case of grandfather, father and son, if the father was an alien, whether he was or was not living at the time of the descent cast, the grandfather could not transmit

lands by descent to the grandson, although both of them were natural born subjects or citizens, or had been duly naturalized. But if the person who died seised of real estate had inheritable blood, such real estate would descend to his next heir who had such inheritable blood, although the person who would otherwise have been the heir of the decedent was an alien. *ib*

3. Thus if the deceased had two sons, and the eldest was an alien, and the youngest was a natural born subject or citizen, the alienage of the eldest son, who otherwise would have been the heir at law of his father, would not prevent the real estate of the father from descending to the youngest son, as heir at law. *ib*

4. And by the common law of England, the alienage, or attainder, of the father did not prevent one of his sons from inheriting directly from another son. *ib*

5. The 22d section of the chapter of the revised statutes, relative to the descent of real property, which provides that no person capable of inheriting under the provisions of that chapter, shall be precluded from such inheritance by reason of the alienism of any ancestor of such person, is broad enough to remove a disability arising from the alienism of the father and grandfather of the person claiming the inheritance; but it does not remove the disability of a person who, in tracing his pedigree and consanguinity as collateral heir of the person dying seised of the premises, must trace it mediately through the blood of the father of the latter, an alien; and who was not an ancestor of the claimant. *ib*

6. Where it is clearly inferable from a record of naturalization that the alien had not, at least three years previous to the date thereof, declared on oath his intention to become a citizen of the United States, and to renounce all allegiance to any foreign prince or sovereignty, and particularly to the king of the country of which he was a subject, as required by the act of 1802; but that the court has mistaken the registry of the arrival of the alien in the United States, for such a declaration of intention, it seems the naturalization is invalid. *ib*

7. But if such record is valid, upon its face, it is conclusive as to the regular-

ity of the proceedings, and of the naturalization of the alien. And such record cannot be contradicted by extrinsic proof that no such declaration of intention had in fact been made. *ib*

## ALIMONY.

Where the wife, who is the defendant in a suit for a divorce, applies for an allowance for ad interim alimony, and for the expenses of her defence, upon a positive affidavit that she is innocent of the adultery charged, proof that the husband has recovered a verdict in an action of crim. con. against the alleged paramour of the wife, is no defence to the application; such proof not being even presumptive evidence of the fact of adultery, as against her. *Williams v. Williams*, 628

## AMENDMENT.

See PRACTICE, 7.

## ANNUITY.

1. Where an annuity is given by a will, and there is no direction as to the time when it shall commence, it commences at the testator's death. *Craig v. Craig*, 76
2. What lands are primarily chargeable with the payment of an annuity to a widow in lieu of her dower, directed by a decree in partition to be paid by the owners of the several parcels of the land partitioned; which decree does not specify the order in which the several parcels are to be charged; and where some of the parcels have been alienated to different purchasers, and are subject to incumbrances. *Livingston v. Freeland*, 510
3. Where an annuity, in favor of the widow of the testator, in lieu of her dower in all the real estate devised to his children, was charged upon the real estate of such devisees generally, and one of such devisees subsequently conveyed a part of the lands devised to him, and the grantees executed the conveyance and covenanted therein to indemnify the grantor against the debts of the testator and to per-



form all of the obligations imposed upon him as such devisee; *Held*, that the grantor's proportionate share of the annuity to the widow was primarily chargeable upon the lands thus conveyed to such grantees. *ib*

4. And where the grantees subsequently reconveyed to the grantor a part of the same premises, with covenants of warranty and seisin; *Held* that the residue of the premises, which remained in their hands after such reconveyance, was primarily chargeable with his share of the annuity; as between their subsequent grantees of such residue and the owner of the lands reconveyed by them to their original grantor. *ib*

### ANSWER.

See EVIDENCE, 1, 2, 3.  
PRACTICE, 3, 4, 5.

### APPEAL.

1. Serving notice of an appeal from a final decree—which decree sets aside proceedings for the transfer of the real estate of a feme covert from the trustee of the estate, to her husband, as being fraudulent and void as against the children of the wife, and which provides for the reimbursement of the trust estate, and for the appointment of a new trustee, &c. with costs; and which gives all the necessary consequential directions—and giving the ordinary appeal bond, in the penalty of \$250, for the costs and damages of the respondent upon the appeal, will operate as a stay of all the proceedings upon the decree appealed from, except the proceedings for the costs, directed to be paid by the appellant. *Wright v. Miller*, 382

2. Except as to the costs, such a decree is not a decree for the payment of money, within the intent and meaning of the 83d section of the article of the revised statutes relative to appeals; so as to make it necessary for the appellant to give security to pay the amount decreed, before the coming in and confirmation of the master's report showing that money is to be paid. *ib*

- 3 The case is different where the decree directs the payment of costs, but which

have not been taxed, or directs the payment of the amount due upon a bond and mortgage, which is a matter of mere computation, upon the coming in and confirmation of the report as to such amount. *ib*

4. Where a final decree directs the appointment of a new trustee, and a conveyance to such new trustee when appointed, if the decree is not appealed from until after such trustee has been actually appointed, the appellant must comply with the provisions of the 83d and 84th sections of the article of the revised statutes relative to appeals, if he wishes to make his appeal a stay of proceedings. *ib*

### ASSIGNMENT.

Where the consideration of an assignment is paid by one person and the assignment is made to another, the whole legal and equitable title to the assigned premises is vested in the latter, except as to creditors of the former. *Ostrander v. Livingston*, 416

See BANKRUPT AND BANKRUPT LAW, 2.  
CORPORATION, 2, 3, 5, 6, 7, 8, 9, 10.  
DEBTOR AND CREDITOR, 7, 8, 9, 10.  
LEASE, 1.  
MORTGAGE, 4, 5, 6, 7, 8.  
PARTNERSHIP, 4, 5, 6, 7, 8.

### ASSIGNOR AND ASSIGNEE.

See LEASE, 2, 3, 4, 5, 7, 8.

### ATTORNEY.

*It seems* there is nothing in the statute, to prohibit an attorney from buying a judgment for the purpose of issuing an execution thereon, and collecting the debt. The policy of the statute does not appear to embrace such a case. *Warner v. Paine*, 630

See BILL OF DISCOVERY.  
PARTIES, 3.  
PRIVILEGED COMMUNICATIONS.

### AUCTION.

Where real estate is sold at auction and without warranty as to the title, and

is conveyed accordingly, and a bond and mortgage is taken back for the purchase money, it is no defence to a suit to foreclose the mortgage, that the title failed in part; where there was no fraud or misrepresentation on the part of the mortgagee, and where the property was put up and sold at the risk of the purchaser. *Banks v. Walker*, 438

## B

### BANKRUPT AND BANKRUPT LAW.

1. Where money and property are received by A. for the use of B., under and by virtue of a judgment given, and an assignment of property made, to him by C., in trust to pay a debt due from C. to B., such money and property constitute, in equity, a trust fund, in the hands of A., for the payment of the debt provided for. And a judgment recovered against him, by B., for the amount thus received by A., for his use, is a fiduciary debt; which will not be discharged by A.'s bankrupt certificate. *Kingsland v. Spalding*, 341
2. An assignment made by a debtor, of his property, in contemplation of bankruptcy, and for the purpose of giving preferences, is not absolutely void, for all purposes; so as to leave the title to the assigned property in the assignor, as if no assignment had been made. But it is only void as against an assignee properly appointed under the bankrupt act. *Seaman v. Stoughton*, 344
3. Where a decree is actually made by the court of chancery, before the discharge of a defendant under the bankrupt act, for the payment of a debt which was contracted before the proceedings in bankruptcy were instituted, such debt may be proved under the decree in bankruptcy. And the discharge of the defendant is a bar to any suit, or other proceeding upon the decree, to charge the defendant personally with the debt; unless such discharge can be successfully impeached for some of the causes specified in the bankrupt act. *Johnson v. Fitzhugh*, 360
4. Where a bill is filed against husband and wife, to foreclose a mortgage executed by them, but before a decree is

obtained in that suit, the husband is declared a bankrupt, by the decree of the district court, the effect of that decree is to vest in the assignee in bankruptcy, the whole interest of both defendants in the mortgaged premises except the inchoate right of dower of the wife in the equity of redemption. And unless the assignee in bankruptcy is made a party to the suit, after the decree in bankruptcy, a decree of foreclosure, subsequently obtained, will be a nullity, as to him; and will not foreclose his equity of redemption in the mortgaged premises. *ib*

5. The proper course for the complainant, in such a case, after the decree in bankruptcy has been obtained, is to file a supplemental bill, in the nature of a bill of revivor; to revive and continue the proceedings against the assignee in bankruptcy, as the party upon whom the equity of redemption has been cast by operation of law. *ib*
6. Where a decree in chancery is entered against a defendant, subsequent to the institution of proceedings in bankruptcy by him, and he afterwards obtains his discharge, and is then sued in an action at law, upon the decree in chancery, his proper course is to plead his discharge, in bar of the suit at law; inserting in his plea the proper averments to show that the debt for the payment of which the decree was made, was contracted prior to the presenting of his petition in bankruptcy; so as to be provable under the proceedings in bankruptcy, and to have been affected by the discharge. *ib*

#### See DEFAULT.

HUSBAND AND WIFE, 1.  
PLEADING, 6, 7.

### BILL OF DISCOVERY.

1. It is useless and improper to make the counsel of a person a party to a mere bill of discovery as to papers alleged to be in his possession; even if the matters inquired of by the bill could be properly disclosed by the counsel, if called as a witness against his client. *Wakeman v. Bailey*, 482
2. In ordinary cases, it is only necessary to call upon the client to answer as to the contents of the deeds or papers of which a discovery is sought; alleging that they are in his hands or in the hands of his attorney or coun-

sel, and thus within his power. And the court, in the absence of any allegation to the contrary, will presume the client can obtain the actual possession, himself, by a proper application to his attorney or counsel. *ib*

- 3 Should that not be the case, however, the proper course is to make the bill of discovery against the client a bill for relief against him and his attorney or counsel, by charging that the latter will not deliver the deed or paper to his client, or permit him to examine it for the purpose of setting out its contents in an answer; or that the client alleges such to be the fact; and therefore praying that the defendants may not only discover whether the deed or paper is in the hands of the attorney or counsel, but that if it is in the hands of the latter he and his client may be ordered to produce it, or that the attorney or counsel may be ordered to produce it to his client, so that the latter may set it forth in his answer. *ib*

4. A party being bound, in the court of chancery, upon a bill of discovery, or for discovery and relief, to produce or discover the contents of deeds and other papers material to the prosecution or defence of the rights of the adverse party, that court, upon a bill properly framed, will give similar relief where the deeds or other papers are alleged to be in the possession of the party's attorney or counsel. *ib*

#### BILL OF INTERPLEADER.

1. A bill of interpleader may be filed whenever it is a matter of doubt to which of the defendants the fund in the complainant's hands actually belongs, so that he cannot safely pay it to either. *Bell v. Hunt*, 391
- 5 Who are proper parties to a bill of interpleader. *ib*
3. Where the holder and owner of a bill of exchange is declared a bankrupt, and it is a matter of doubt whether such bill was not within the jurisdiction so as to pass to the assignee in bankruptcy, except as to bona fide holders thereof without notice, the drawer of the bill, who is liable to pay the same to the rightful holder and owner, may file a bill of interpleader against the different claimants of such

bill to compel them to settle the right to the same between themselves. *ib*

#### BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The purchaser of a negotiable note, or bill of exchange, not payable on demand but at a specified time, is not a bona fide holder thereof without notice, if he became such purchaser after the bill or note had become due and was dishonored. In other words, the purchaser of a bill or note which has become due and payable, according to the terms thereof, takes it subject to all equities, or legal or equitable defences which existed against it in the hands of the person from whom he received it. *De Mott v. Starkey*, 403
2. After a judgment creditor has voluntarily discharged the acceptors of a draft upon which a judgment had previously been recovered against the endorser, by taking other security from such acceptors for a part of the debt, he cannot, in equity, enforce the judgment against the endorser of such draft; and the endorser will be entitled to a perpetual injunction restraining the assignee of the judgment from collecting the same of him. *Douglass v. White*, 621

See GIFT.

#### BONA FIDE PURCHASER.

1. It is a general rule of equity pleading that a defendant who claims protection as a bona fide purchaser without notice, must deny such notice although it is not distinctly charged in the bill. *Lowry v. Tew*, 407
2. Where the purchaser of a bond and mortgage, obtained from the owner thereof by fraud and felony—though he has no reason to suspect any fraud in the transaction, so as to be put upon inquiry—pays for such securities less than the amount actually due thereon, if he is entitled to protection as a bona fide purchaser without notice, he will not, in equity, be permitted to retain the bond and mortgage for the full amount due thereon; but only for the amount which he paid for them. *Peabody v. Fenton*, 451
3. Even in the case of negotiable paper which has been lost by the owner, or

which has been obtained from him by fraud, or by larceny, the holder thereof cannot retain it as against the rightful owner, where he received it under circumstances which were calculated to throw a suspicion upon the right of the person from whom he received it, to dispose of it as his own. For purchasing a security under such circumstances is gross negligence. *ib*

4. Thus where persons purchased a bond and mortgage originally given to secure the payment of \$8000, and upon which the sum of \$2000 and the annual interest had been paid; they paying therefor only three-fourths of their actual value, in unsaleable goods at forty per cent above their market price, and out of the usual course of business; *Held* that the fact that the pretended owner of the securities was willing to make such a sacrifice, and for articles which he did not intend to use himself, but which were to be immediately sent to an auctioneer to be sold, was sufficient to put the purchaser upon inquiry as to the ownership of the bond and mortgage. *ib*

5. A party, to be protected as a bona fide purchaser without notice, must have acquired the legal title, as well as an equitable right, to the property. *ib*

6. To entitle a party to the character of a bona fide purchaser without notice of a prior right or equity; he must not only have obtained the legal title to the property, or the negotiable security, but he must have paid the purchase money, or some part thereof at least, or have parted with something of value upon the faith of such purchase, before he had notice of such prior right or equity. *De Mott v. Starkey*, 403

See **BILLS OF EXCHANGE, &c. 1.**  
**HUSBAND AND WIFE, 17.**  
**MORTGAGE, 7.**

### BOND.

Where the condition of a bond, dated December 14, 1833, was that the obligor should pay to the obligee the sum of \$3200, to be paid in manner following, viz. \$1000 on the first of April next, the remainder in four annual payments thereafter, of \$550 each, interest annually; *Held* that the obligee

was not entitled to any interest during the interval between the date of the bond and the first of April, 1834, when the first payment was to be made. *Fellows v. Harrington*, 65

See **APPEAL.**

### BORROWER.

See **USURY.**

## C

### CASES OVERRULED, DOUBTED, COMMENTED ON, AND EXPLAINED.

1. *Andrews v. Dieterich*, (14 *Wend. Rep.* 36,) doubted. *Mowry v. Walsh*, (8 *Cowen*, 238,) and *Parker v. Patrick*, (5 *Term Rep.* 175,) commented upon. *Peabody v. Fenton*, 451
2. *The Executors of Brasher v. Van Cortland*, (2 *John. Ch. Rep.* 242, 400,) and *Beach v. Bradley*, (8 *Paige's Rep.* 146,) commented on and explained. *Gorham v. Gorham*, 24
3. *Flanagan v. Flanagan*, (1 *Bro. C. C.* 500,) commented upon, and overruled. *Graham v. Dickinson*, 169
4. *Wright v. Wright*, (1 *Cowen*, 598,) commented upon, and overruled. *Craig v. Craig*, 76
5. The case of *James v. James*, (4 *Paige*, 117,) commented on, and explained. *ib*
6. *Westmore v. Scovel*, (3 *Edw. Ch. Rep.* 515,) approved of. *Hoyt v. Mackenzie*, 320
7. The dictum of Bronson, J. in *Thompson v. Hewitt*, (6 *Hill*, 254,) that the original debt was merged and extinguished by the judgment, limited to the case which he then had under consideration. *Johnson v. Fitzhugh*, 360

### CERTIFICATE.

See **EVIDENCE, 4.**

## CHARGE.

Where the owner of a charge upon the lands of several persons, which charge is primarily chargeable upon the lands of one of them, with full knowledge of the equitable rights of the parties, releases the lands primarily chargeable, he will not be permitted to enforce his charge against the lands which are only secondarily liable. *Livingston v. Freeland*, 510

See ANNUITY, 2, 3, 4.

## COMMITTEE.

See LUNATICS.

## COMMON OPINION.

See MAXIMS.

## COMPTROLLER'S DEED.

1. It is not necessary that a deed given by the comptroller to the purchaser of lands sold for taxes, should be technically executed in the name of the people. It is sufficient if it recites the substance of the statutes under which the sale was made, the non-payment of the taxes charged upon the land, the advertisement and sale of the premises, the payment of the purchase money by the grantee, and that the premises have not been redeemed; and purports to convey the land to the original purchaser, or his assigns, *by virtue of the authority vested in the comptroller by law*; and is executed under the comptroller's official seal, and witnessed by one of the officers mentioned in the statute. *The Bank of Utica v. Mersereau*, 528
2. The statute does not require a comptroller's deed to state in what year the tax was assessed, for the non-payment of which the land was sold. Hence if the deed states that the taxes have been assessed and returned to the comptroller, and have remained unpaid for two years, this is all that is necessary to show upon the face of the deed that the comptroller was authorized to make the sale. *ib*
3. The prima facie evidence of ownership in the grantee afforded by a

comptroller's deed, is liable to be rebutted by proof that the tax, returned to the comptroller as unpaid, had actually been paid to the collector. *ib*

4. Such prima facie evidence may also be rebutted by showing that the land thus sold and conveyed by the comptroller, or some part of it, was actually occupied by some person at the expiration of two years from the time of the sale, or that it was so occupied at the time of the giving of the comptroller's deed; so as to throw upon the party claiming under such deed the necessity of giving to the occupant the notice to redeem which is required by the statutes on this subject. *ib*

See TAX SALES.

## CONSIDERATION.

See ASSIGNMENT.

## CONTINGENT REMAINDER.

- A contingent remainder may be limited on a term of years; provided the nature of the contingency upon which it is limited is such that the remainder must vest in interest, if ever, during the continuance of not more than two lives in being at the time of the creation of such remainder, or upon the termination of not more than two lives then in being. *Buller v. Buller*, 304

## CORPORATION.

1. By the English common law, corporations aggregate, including religious corporations, and some corporations sole, had the same right as natural persons to alien real estate, which they had the capacity to take and hold; and for the same purposes and objects. *De Ruyter v. Trustees of St. Peter's Church*, 119
2. A corporation has the right to make an assignment in trust for its creditors; and may exercise it to the same extent, and in the same manner, as a natural person; unless restrained by its charter, or by some statutory provision. *ib*

3. The trustees of a religious corporation have the power, with the consent of the court of chancery, and under the sanction of its order, to make an assignment of the real estate of the corporation, to trustees, in trust for the payment of all the creditors of the corporation ratably. And their deed of such real estate, under the corporate seal, will vest in the grantees the legal title of the corporation in such real estate, and in the equity of redemption in mortgaged premises. *ib*
  4. The date of the incorporation of a company, under the provision of the revised statutes declaring that if any corporation created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation its corporate powers shall cease, is the time when the act creating the corporation takes effect as a law. *Johnson v. Bush*, 207
  5. An assignment, by the officers of a corporation, of a bond and mortgage exceeding one thousand dollars and constituting a part of its capital stock, is void; unless made in pursuance of a previous resolution of the board of directors authorizing such assignment. *ib*
  6. But it seems that the proof by the subscribing witness to such an assignment, before the commissioner of deeds, that the corporate seal was affixed to the same by the authority of the corporation, is *prima facie* evidence that the assignment was authorized by the board of directors. *ib*
  7. If an assignment of that nature is duly authenticated for the purpose of authorizing it to be recorded, it may be received in evidence, without further proof; subject, however, to the right of the adverse party to show that it was not duly executed by the corporation, because no resolution of the directors had authorized the person entrusted with the corporate seal to affix the same to such an assignment. *ib*
  8. Where, by statute, a resolution of the board of directors of a corporation is necessary to authorize an assignment of corporate property by the officers of such corporation, a certificate of proof before the acknowledging officer that the corporate seal was affixed by the officer entrusted with such seal by the corporation, is not alone sufficient to authorize such assignment to be recorded, or to be read in evidence without further proof. *ib*
  9. A corporation has no legal power to take a surrender of a part of its capital stock, not for the purpose of issuing new scrip therefor to other persons, upon being paid or secured the amount of the same from them, but as an extinguishment of a part of the capital of the company, and to give up the property or effects of the company in exchange for the same. And the assignment of the bond and mortgage, held by a corporation, in pursuance of such an arrangement, being in direct violation of the provisions of the statute, the assignee will acquire no legal or equitable right to such bond and mortgage by such an assignment. *ib*
  10. Where a corporation took from one of its stockholders a surrender of twenty shares of its capital stock, held by him, and endorsed the amount of the par value thereof upon a bond and mortgage which it held against him, and then assigned the residue of the debt secured by that bond and mortgage, to certain other stockholders, upon the surrender of the stock held by them; *Held* that both transactions were in direct violation of the provisions of the statute prohibiting the directors of any moneyed corporation from dividing, withdrawing or in any manner paying to the stockholders any part of the capital stock of the corporation, without the consent of the legislature. *ib*
- See INSOLVENT CORPORATIONS.  
INSURANCE.  
STATUTE.
- COSTS.
1. Notice to the clerk to enter the appearance of the defendant is a proper charge, on the taxation of costs, where the defendant's solicitor did not attend the office in person, to have the appearance entered. But the solicitor is not entitled to an allowance for attendance upon entering such appearance. *Mann v. Rice*, 42
  2. An engrossment of an affidavit which is not to be filed, is not taxable. *ib*
  - 3 The costs of an unsuccessful motion,

- or of an unsuccessful resistance to a motion, are not taxable against the adverse party as costs in the cause, unless a direction to that effect is contained in the order of the court. But the costs of a successful resistance to a motion are properly allowable, if the order denying the motion contains nothing to the contrary. *ib*
4. A defendant is not entitled to charge for a copy of his answer, to be used in opposing a motion, unless for some special reason, other than the negligence of his solicitor, it becomes necessary to make a new copy for that purpose. *ib*
  5. Where the costs of a motion to dissolve an injunction are reserved until the hearing, they will abide the event of the suit, in case no special directions are given at the hearing. And if the event of the suit shows that injustice and equity the injunction never should have been granted, the defendant is entitled to the costs of the motion to dissolve it, as costs in the cause. *ib*
  6. A charge for a brief, upon the settlement of interrogatories, is not taxable. *ib*
  7. But a party is entitled to charge for solicitor and counsel attending upon the settlement of interrogatories, and arguing the same; that being, in substance, a reference, according to the practice of the court, to a master to settle the interrogatories. *ib*
  8. But the settlement of the interrogatories and cross-interrogatories should take place at the same time, and form but one proceeding. And after the interrogatories have been settled, the party is not entitled to charge for fees to solicitor and counsel upon the settlement of cross-interrogatories, at a subsequent time. *ib*
  9. Copies of cross-interrogatories, as settled, for the party proposing them, and for the adverse party, are chargeable. But a notice that the copy served is a copy is not allowable. *ib*
  10. A solicitor who serves a paper on the adverse party cannot be allowed an extra charge for giving him notice that the paper served is what it purports to be. *ib*
  11. A notice, to the opposite solicitor, of the order to close the proofs, is not taxable. But a notice to the examiner, of the entering of such order, is proper. *ib*
  12. After a bill has been dismissed, with costs, a copy of the opinion of the vice chancellor is not wanted by the defendant's solicitor for any of the purposes of the suit, and ought not to be charged to the adverse party, upon taxation. *ib*
  13. Where the complainant improperly and unnecessarily comes into the court of chancery for relief, and the defendant neglects to make the objection that the remedy of the complainant, if any, was at law, whereby the chancellor is compelled to take jurisdiction of the case and to decide it upon the merits, he may, in the exercise of a sound discretion, refuse to give to either party the general costs of the litigation. *The Bank of Ulster v. Mercereau*, 528
- See HUSBAND AND WIFE, 15.
- COUNSEL.
- See BILL OF DISCOVERY.
- COVENANT.
- See AGREEMENT.  
ESTOPPEL, 3, 4, 6, 9, 10, 11.
- CREDITOR'S BILL.
1. Where a judgment debtor dies before the judgment creditor has obtained an equitable lien upon his personal property by the filing of a creditor's bill, it cannot be reached by filing a bill of that nature against the widow and heirs of the deceased debtor. *Wilber v. Collier*, 427
  2. An ordinary judgment creditor's bill is not the proper remedy to reach real estate of a deceased judgment debtor, or an equitable interest in real estate, which has descended to his heirs at law. *ib*
  3. If the decedent held the legal title, so that the judgment was a lien upon the land, the judgment creditor's proper course is to revive the judgment against the heirs or devisees of the

decendent, and then to have the property sold upon execution. But if the decendent's interest in the real estate was a mere equitable interest, under a contract to purchase, or otherwise, which cannot be sold on execution, the judgment creditor, after exhausting his remedy against the personal representatives of the decendent, or ascertaining that they have no assets to pay his debt, should apply to the surrogate, to compel them to sell the equitable interest of the testator, or intestate, for the payment of his debts; as authorized by the revised statutes. *ib*

4. It is not necessary for the assignee of a judgment to issue a new execution thereon before he can file a creditor's bill against the defendant. *Strange v. Longley*, 650

5. It is a good objection to an application for the appointment of a receiver in a creditor's suit, that no execution has been issued to the county in which the judgment debtor resided. *ib*

6. Where the complainant in a creditor's suit has sworn positively, in his bill, that an execution has been issued to the county in which the judgment debtor resided, an injunction granted in such suit will not be dissolved, upon a simple affidavit contradicting that fact. The defendant must put in his answer, denying the allegation, and then move to dissolve the injunction on bill and answer. *ib*

7. In the case of an execution issued before the statute was passed, requiring executions to be made returnable sixty days after the delivery thereof to the sheriff, a creditor's bill, founded on such execution, should state at what time the execution was made returnable. *ib*

8. Where the complainant in a creditor's suit claims the whole of the debt and costs included in a judgment, as the assignee of such judgment, he must show a valid assignment entitling him to the costs as well as to the debt, or the original judgment creditor, to whom the costs belong, must be joined with him in the suit, or must be made a party to the same as one of the defendants therein. *ib*

9. Where it does not appear from such bill that the whole judgment has been assigned to the complainant, but it is

merely stated that the obligations upon which the judgment was recovered, have been assigned to him, the bill is defective. *ib*

10. A general averment, in such a bill, that the defendant is primarily liable for the payment of the obligations upon which the judgment was recovered, is too indefinite to excuse the complainant from issuing an execution to the county where the other judgment debtors reside; or making them parties to the suit. *ib*

## CUSTOM.

See MAXIMS.

## D

## DAMAGES.

See JURISDICTION, 2.  
LITERARY PROPERTY, 1.

## DEBTOR AND CREDITOR.

1. The personal property left by a decendent belongs to the personal representatives, and can only be reached by a proceeding against them. And if no other person will administer upon the estate, the judgment creditor should himself apply to the surrogate, and obtain letters of administration, and then apply the personal property of the decendent to the payment of debts in a due course of administration. *Wilber v. Collier*, 427
2. If his is the oldest judgment, such creditor will be entitled to priority over other creditors. But if there are older judgments, the fact that his execution had been returned unsatisfied before the death of his creditor will not entitle him to any preference. *ib*
3. *Aliter* if he has acquired a specific lien upon the property, by the levy of his execution thereon in the lifetime of the judgment debtor. *ib*
4. The fact that the widow and children of a deceased judgment debtor have taken possession of, and used, his personal property, after his death, will not authorize the judgment creditor



to proceed against them by bill, to obtain satisfaction of the judgment; they not being liable to be sued as executors of their own wrong. *ib*

6. Creditors by judgment, or otherwise, may reach an equitable interest in real estate, which their deceased debtor held under a contract to purchase, by a suit against his heirs to whom it has descended. But before they can do this, in addition to exhausting their remedy against the personal representatives of the decedent, or showing by their bill that there was no personal estate to pay the debts, they must wait until the expiration of three years from the time of granting letters testamentary or of administration. *ib*

b. As between heirs and devisees, by the common law, lands undisposed of by the will are first to be applied to the payment of the debts of the testator; where the personal estate is not sufficient for that purpose. *Gratum v. Dickinson*, 169

7. An assignment by a debtor which attempts to appropriate a part of his property for the use of his wife, to satisfy an alleged claim in her favor which she could not have recovered from the assignor by any suit or proceeding, either at law or in equity, is fraudulent and void as against the creditors of the assignor; if the property of such assignor, at the time of the assignment, was not sufficient to pay all his other debts, and the alleged claim of his wife also, or so much of it as was attempted to be secured by the assignment. *Planck v. Schermehorn*, 644

8. If a debtor has ample property to pay all his debts, it is a fraud upon his creditors for him to assign all his property to an assignee, and to authorize such assignee to employ the proceeds thereof in defending suits which may be brought against the assignor by his creditors, to recover their several debts; the effect of such assignment being to delay his creditors in the collection of their debts. *ib*

9. It is equally fraudulent, under the statute, for a debtor to make an assignment of his property for the purpose of delaying creditors in the collection of their debts, as it is to assign it in order to defeat the final collection of such debts. *ib*

10. A clause in an assignment, empowering the assignee to mortgage, or lease, the assigned estate, is void as against creditors. So also, is a reservation of the right of the assignor to name the successor of the assignee, in case such assignee should wish to resign the trust. *ib*

See CREDITOR'S BILL.  
HEIR.

## DECLARATIONS.

1. A declaration by a testator, made five years after the execution of a will by him, and when he was about to execute another will, that he had been influenced to make a former will in which he had not done justice to his grandchildren, is not sufficient to authorize the court to reject the probate of the former will, which was duly executed, when the testator was in the possession of his mental faculties, and entirely free from restraint. *Nelson v. McGiffert*, 158

2. The declarations of a testator, made after the execution of his will, cannot be received as evidence of what he intended by the terms nephews and nieces. *Cromer v. Pinckney*, 466

## DECREE.

1. A decree setting aside proceedings, by which the real estate of a feme covert had been transferred from the trustee of the estate and vested in her husband, as being fraudulent and void as against the children of the feme covert; directing a reference to a master to ascertain the value of those portions of the trust estate which have been sold by the husband to bona fide purchasers, and what sum, if any, should be paid by him to reimburse the trust estate, and to report a proper person and appoint him as trustee; and giving all the consequential directions, so as finally to dispose of the whole case upon the coming in and confirmation of the master's report, by a common order in the clerk's office, without the necessity of bringing the cause again before the court for any other decree, or further directions, and which also disposes of the question of the final decree. *Wright v. Miller*, 393

2. No decree can be founded upon evidence in relation to matters not put in issue, between the parties, by the pleadings. *Tripp v. Vincent*, 613
3. Form and requisites of a decree for the redemption of mortgaged premises, where the mortgage has been assigned by the mortgagee to a third person as security for a debt. *Sweet v. Van Wyck*, 647

See FORECLOSURE SUIT,  
JUDGMENT, 2, 3.

### DEED.

1. A deed executed by an attorney may be recorded, upon his acknowledgment before the proper officer, or upon due proof that such deed was executed by him; without proving the power under which the attorney acted in executing such deed. *Johnson v. Bush*, 207
2. A deed may be delivered to a stranger, for the grantee named therein, without any special authority from the grantee to receive it for him. And if the grantee assents to it, afterwards, the deed is valid from the time of the original delivery. *The Lady Superior, &c. v. McNamara*, 375
3. Such assent will be presumed, from the beneficial interest of the grantee in the deed, unless a dissent is proved. *ib*
4. Where a deed is delivered to a third person, without any authority from the grantee, who refuses to accept or ratify the deed, such delivery is invalid. *ib*

See COMPTROLLER'S DEED.  
LEASE.  
USES.

### DEFAULT.

1. Whether a regular default will be set aside to let in the defendant to set up his discharge under the bankrupt act? *Quare. Kingsland v. Spalding*, 341
2. Where a defendant has had an opportunity to set up his discharge under the bankrupt act, as a technical defence, and has neglected to do so, the court will not open a regular default

for the purpose of enabling him to set up such discharge. *Freeman v. Warren*, 35

See FORECLOSURE SUIT, 8.

### DEVISEES.

1. Where a testator charged his personal estate with the payment of his debts, but it being insufficient for that purpose, his executors applied to the surrogate for, and obtained, an order for the sale of his real estate in the possession of his devisees, which was sold accordingly, and the proceeds applied to the payment of the debts of the testator; and subsequently the commissioners under the treaty with France awarded to the executors a sum of money, upon a claim which their testator had against the French government at the time of his death, which fund they received for the benefit of the estate; *Held* that the sum of money thus received upon the French claim was in equity to be considered a substitute for the real estate sold for the payment of debts primarily chargeable upon the testator's personal property, and that it belonged to those who were the devisees, or the owners, of the land thus sold, at the time of the sale. *Graham v. Dickinson*, 169
2. *Held also*, that such devisees, or owners, were exclusively entitled to the *spes recuperandi*, or the hope of obtaining satisfaction from the French government, for the claim against it, the moment their property was sold under the order of the surrogate. That they were entitled to the proceeds of that claim, not as real estate, but as a fund to which they had an equitable right to resort, to remunerate them for the loss of their lands. *ib*

### DISCOVERY.

1. It is well settled, independent of any statutory provision on the subject, that a defendant, in a bill in chancery, is not bound to make a discovery as to any charge of felony against him, or as to any criminal offence involving moral turpitude. *The Union Bank v. Barker*, 358
2. The language of the act of January 30, 1833, providing that a defendant

shall be compelled to answer any bill in chancery charging him with being a party to any conveyance, or assignment, made or created with intent to defraud prior or subsequent purchasers, or to hinder or defraud creditors or other persons, or where the defendant shall be charged with any fraud whatever, affecting the rights or property of others, but that no such answer shall be received as evidence against any party thereto, on any complaint, or on the trial of any indictment, for the fraud charged in the bill, is broad enough to embrace a fraud committed by the defendant by means of his own forgery. But it was not the intention of the legislature, by that act, to compel a defendant, in a bill in chancery, to answer such a charge upon his oath. *ib*

3. The act of 1833 was intended to embrace a class of frauds, affecting the rights of property, which were not punishable by the common law, but which, by the statutes of this state, are now made criminal; so that the effect of the several statutory provisions, subjecting persons guilty of such frauds to criminal prosecutions therefor, should not deprive the parties injured, of the discovery and relief to which they were formerly entitled in the court of chancery. *ib*

1. *Held*, accordingly, that defendants were not bound to answer a charge of having entered into a conspiracy to defraud the complainants and others by means of forgeries; and of having actually obtained several sums of money by means of forged drafts and checks. *ib*

#### See BILL OF DISCOVERY.

#### DONATIO MORTIS CAUSA.

1. An absolute delivery, and a continued change of possession, are essential requisites of a good *donatio mortis causa*. *Craig v. Craig*, 76
2. The promissory note of the donor is not a valid gift *mortis causa*. *ib*

#### DOWER.

#### EXECUTORS AND ADMINISTRATORS, &c.

## E

### ESTOPPEL.

1. Where a party enters into the possession of land, claiming under a particular title, he cannot set up an outstanding title in a stranger, as a defence to a suit, brought by the owner of the title under which he entered, to recover the possession of the premises. *The Bank of Ulster v. Mooreau*, 528
2. But a party who has gone into possession of land as the tenant of another, and acknowledging his title, is only estopped from denying the validity of that title, and setting up a better right in himself, so long as he retains the possession; or during the continuance of the tenancy. For upon the termination of the lease and the restoration of the possession, he may sue and recover back the possession of the premises, upon showing a better title in himself. *ib*
3. By the common law, if a grantor who has no interest, or only a defeasible interest, in the premises granted, conveys the same with warranty, and afterwards obtains an absolute title to the property, such title immediately becomes vested in the grantee, or his heirs or assigns, by estoppel. And if the grantor, or any one claiming title from him subsequent to such grant, seeks to recover the premises by virtue of such after acquired title, the original grantee, or his heirs or assigns, by virtue of the warranty, which runs with the title to the land, may plead such warranty, by way of rebutter, or estoppel, as an absolute bar to the claim. *ib*
4. This principle has been applied to all suits brought by persons bound by the warranty, or estoppel, against the grantee or his heirs or assigns; so as to give the grantee, and those claiming under him, the same right to the premises as if the subsequently acquired title, or interest therein, had been actually vested in the grantor at the time of the original conveyance from him with warranty; where the covenant of warranty was in full force at the time when such subsequent title was acquired by the grantor. *ib*

5. And where an estoppel runs with the land it operates upon the title, so as

actually to alter the interest in it, in the hands of the heirs or assigns of the person bound by the estoppel, as well as in the hands of such person himself. *ib*

6. As a covenant of warranty runs with the land, so as to give the heirs and assigns of the grantee the benefit of the estoppel as against the warrantor, it runs with the subsequently acquired interest of the warrantor, in the hands of the heirs and assigns of the latter; so as to bind that interest, by the estoppel, as against any person claiming the same under him, *in the post.* *ib*
7. Where parties go into possession of premises claiming title thereto under a conveyance to a particular grantee, they cannot set up an outstanding title in a stranger, to defeat a person who claims the premises under the same title as themselves, but by a prior right which overreaches their claim. *ib*
8. Persons entering into possession of land under the defendant in a judgment, subsequent to the issuing of an execution thereon, are bound to yield up the possession to the purchaser under such execution, unless they can show a better right in themselves, or establish the fact that the judgment was invalid, as against them. *ib*
9. Where the breach of the covenant of seisin in a deed affects the whole title, so that nothing passes to the grantees, a recovery by such grantees for the damage sustained by the breach of that covenant, may have the effect to prevent the operation of the estoppel created by such covenant, or even by a covenant of warranty; by creating a counter estoppel, which would prevent the grantees, or those claiming under them, from alleging that they acquired the title to the land by the original conveyance to them. *ib*
10. Although the grantee in a deed which contains a covenant of seisin, in connection with general covenants of warranty, and the heirs and assigns of such grantee, are not estopped by such deed from showing that the grantor had no title to the land attempted to be conveyed, the warrantor, and those claiming under him, *in the post*, are estopped, by his covenants, from alleging that he had not a perfect title to the land when he conveyed the same with warranty. *ib*
11. Hence a reconveyance of the land, by the grantee thereof, without covenants of warranty in such reconveyance, will not prevent such original grantee from recovering for a breach of the covenant of seisin contained in the conveyance of the premises to him. *ib*

See JUDGMENT, 2, 3.

## EVIDENCE.

1. Upon a bill to set aside a bond and mortgage alleged to have been given by an insolvent debtor, to the mortgagee, to defraud the creditors of the mortgagor, if the assignees of the mortgage deny any knowledge of the alleged fraud, by a separate answer, the answer of the assignor cannot be used as evidence against them to establish such fraud. *Dunham v. Gates*, 196
2. But if they join with him in an answer and admit their belief that what he states in the answer is true, if his admissions in such answer establish the fraud, it is sufficient to entitle the complainant to a decree against the assignees of the mortgage. *ib*
3. And where the assignees of the mortgage put in a joint answer with the assignor, what is stated by him in such answer, responsive to the charges or interrogatories in the bill, will be evidence in favor of the assignees, to the same extent that it is evidence in favor of the assignor. *ib*
4. The certificate of the clerk of a court is not evidence of the existence of a judgment, except in those cases where it is made evidence by statute. *Lansing v. Russell*, 325
5. Independent of any statutory provision, the proper way to prove the existence of a judgment is by the production of the record itself, or of an exemplification thereof, or of a sworn copy of such record. *ib*
6. In what cases the testimony of experts is proper, upon the trial of an issue as to the genuineness of the grantor's signature to a deed; and what credit such testimony is entitled to. *ib*
7. The testimony of experts, who have

been in the habit of examining the marks and signatures of aged, as well as of middle aged and of young persons, for the purpose of determining the genuineness of such marks and signatures, is proper; to show that the mark to an instrument alleged to be a forgery, could not have been the genuine mark of a very aged man, but was a simulated mark. *ib*

See ALIMONY.  
WILL, 4, 5, 6, 7.

# EXECUTION.

1. A person has no right to apply to the court to set aside an execution for irregularity, so far as it affects his rights, in a suit to which he is not a party. *Pierce v. Alsop*, 184
2. The issuing of an execution, after the lapse of two years, without reviving the judgment by scire facias, where all the parties to the judgment are alive, is an irregularity merely; and does not render a sale under it void. *ib*
3. The lands of a judgment debtor were not liable to be sold on execution, by the English common law; but by the statutes of extents and elegits they were set off to the judgment creditor until his debt should be paid. *The Bank of Ulrica v. Mersereau*, 528
4. The statute of 32 Hen. 8, chap. 5, giving a remedy to the creditor to whom the debtor's land had been delivered in extent, upon elegit, where the tenant by elegit was afterwards evicted out of or from the possession of such land, being a part of the general law of England at the time of the first settlement of New-York under the charter to the Duke of York, it became a part of the common law of the colonists; in connection with the principles of the statutes of extents and executions then existing in England. But when the statute of 5 Geo. 2, chap. 5, subjected real estate in the colonies to sale upon execution, in the same manner as personal property, the writ of elegit was virtually abolished here. *ib*
5. The equitable principle of the statute of 32 Hen. 8, chap. 5, however, still applied to the case of a creditor who had purchased the real estate of his

debtor, upon execution. And it continued to be a part of the law of the colony; though the particular form in which the relief had been given was no longer strictly applicable to the sale under an execution. The court of chancery, therefore, has jurisdiction to act upon the equitable principle of the English statute, by giving relief to the purchaser at a sale of lands upon execution, for an eviction, or failure of title; upon an application to the equitable powers of that court. *ib*

6. Where the plaintiff in a judgment is himself the purchaser, and has been evicted for want of title in the judgment debtor, his remedy still depends upon the equitable principle of the colonial law, derived originally from the statute of Hen. 8, as applied to sales of land upon execution; which equitable principle has been applied, by analogy, to sales of personal property, &c. where the plaintiff became the purchaser and was subsequently deprived of the benefit of his purchase for want of title in the judgment debtor. *ib*
7. Where the common law does not provide for such cases, they are proper subjects for the interference of the court of chancery; or for relief upon a summary application to the equitable power of the court out of which the execution issued. *ib*
8. This equitable principle applies to a case where a judgment creditor purchased premises at a sale thereof by the sheriff, under the judgment, in the belief that the title was in the judgment debtors, or one of them, at the time of the docketing of the judgment; and where the judgment debtors, in a statement of their property, furnished to the judgment creditor, and others, previous to such sale, had represented that they were the owners of the lands subsequently sold and bid off by the judgment creditor. *ib*
9. A mortgage, or assignment, of personal property, to secure the payment of antecedent debts, is not entitled to a preference over an execution previously placed in the hands of the sheriff to be executed; although no levy had been actually made at the time of executing the mortgage, or assignment. *Warner v. Paine*, 630

## EXECUTORS AND ADMINISTRATORS.

1. As a general rule, a foreign executor is not entitled to sue in our courts, without having proved the will, and taken out letters testamentary thereon, in the proper probate court of this state. *Lawrence v. Lawrence*, 71
2. And where two executors are named in a will, and one of them has taken out letters testamentary in this state and the other has not, the one who has obtained letters here may sue in his own name alone, without naming the other as a party. *ib*
3. These rules, however, are only applicable to suits brought by executors for debts due to the testator, or where the foundation of the suit is based upon some transaction with the testator in his lifetime. They do not prevent a foreign executor from suing in our courts upon a contract made with himself, as such executor. *ib*
4. In such a case the executor with whom the contract is made may sue upon it, in his own name, without proving that letters testamentary were granted to him any where. *ib*
5. Where an executor takes a security in his own name, from his co-executor, for moneys received by the latter as executor, he takes such security merely as a trustee for the persons interested in the estate of the testator. *ib*
6. Where a testator, by his will, gives no authority to his executors to sell his real estate, the executors cannot sell any portion thereof, either for the purposes of division or otherwise. *Craig v. Craig*, 76
7. But where an express power in trust is given to executors to divide a specified part of the real and personal estate of the testator into four equal parts, and to invest two of the shares for the benefit of two of his children, this is a valid and imperative power in trust, under the provisions of the revised statutes, to divide such real estate into four equal parts, by a valid and legal instrument setting off the share of each devisee in severalty, under the will. *ib*
8. Where the widow's dower in the real estate of her deceased husband has

been assigned to her previous to the application to the surrogate for a sale of the estate of the decedent, for the payment of his debts, the part assigned to the widow for dower should be sold subject to her life estate therein as tenant in dower. *Maples v. Howe*, 611

9. And where the estate of the decedent consists of an entire farm which the surrogate's order directs to be sold together as one farm, the administrator should sell the whole farm, including the part assigned to the widow for dower; subject to her life estate in that part as tenant in dower. *ib*
10. Where the surrogate's order does not direct a sale upon credit, the administrator should sell for cash; unless all the creditors consent to a sale upon credit. *ib*
11. Where executors employ a person not authorized to practice, to foreclose a mortgage due to the estate of their testator, and he forecloses the same in the name of another person, as solicitor, but from the ignorance of the person so employed by the executors, the mortgage is irregularly foreclosed, so that a part of the debt is lost; such executors are answerable to the legatees for the amount of such loss. *Wakeman v. Hazleton*, 43

See ACCOUNT.  
SET-OFF.

## EXPERTS.

See EVIDENCE, 6, 7.

## F

## FALSE PRETENCES.

See BONA FIDE PURCHASER.  
MORTGAGE, 7.

## FERRY.

Notice of an application to the court for a license to establish a ferry, need not be given to all who claim a right to the ferry; nor even to all those who have obtained a license from another court for a ferry at the same place.

All that is required, where the applicant is not the owner of the land through which the highway adjoining to the ferry runs, is that the person applying for a license shall give notice of the application, to the owners of such land. *Wiswall v. Wandell*, 312

See PLEADING, 1.

## FORECLOSURE SUITS.

1. Where a mortgage is given by husband and wife, as executor and executrix, to their co-executrix, to secure the payment of moneys of the estate received by the husband as executor, the wife, after her husband's death, cannot file a bill, in her character of executrix, against his personal representatives and heirs at law, to foreclose such mortgage; where it does not appear from such bill that she is entitled to a portion of the fund secured by the mortgage, as a legatee, for her sole and separate use. *Lawrence v. Lawrence*, 71
2. If, in such a case, the wife had an interest in the fund, and the co-executrix to whom the mortgage was given, upon a proper application to her for that purpose, refuses to proceed to foreclose the mortgage, the widow of the mortgagee, and the other legatees for whose benefit the mortgage was given, may file a bill showing their respective rights in the fund; and claiming to have the benefit of such mortgage, and of a foreclosure thereof. *ib*
3. But in that case the mortgagee, and all the legatees who are interested in the fund, must be made parties to the suit; or the bill must be filed by some of the legatees in behalf of themselves and of all others having an interest in the fund. *ib*
4. Where a bill was filed to foreclose a mortgage, which was a valid lien upon premises worth the whole amount due on such mortgage, including costs of foreclosure, but owing to the ignorance or carelessness of the person employed to foreclose the mortgage, a subsequent purchaser of the mortgaged premises, from the mortgagor, was not made a party, and the bill having been taken as confessed against the mortgagor, a decree of foreclosure and sale was entered, and the premises were sold, for less than one third of the amount due upon the mortgage, to a person who transferred his bid to the owner of the equity of redemption; *Held* that the decree for a foreclosure and sale was a mere nullity, so far as the rights of the owner of the equity of redemption were concerned; and that it was a proper case for setting aside such decree, and the sale under it, and for granting leave to amend the bill, upon the application of the complainants, on terms. *Wakeman v. Hazleton*, 148
5. Where an appeal, by the defendants in a foreclosure suit, has prevented the complainants from obtaining the master's report, and a final decree, for a long time, during which time the respondents have been kept out of the possession of the mortgaged premises, and of the rents and profits thereof, the appellants may be directed to pay to the respondents the rents and profits of the mortgaged premises during the time for which the proceedings have been stayed, by the appeal, or so much of them as may be necessary to pay the deficiency; as the damages of the respondents for the delay and vexation which they have sustained by the appeal, if upon the foreclosure and sale of the premises, under the decree which is finally entered in the suit, it shall turn out that the proceeds of the mortgaged premises are not sufficient to pay the amount due to the complainants, with interest and costs. And if necessary, a reference may be directed, to ascertain the amount of such rents and profits. *The Bank of Ulica v. Finch*, 293
6. The complainant, in a foreclosure suit, cannot make a person who claims the mortgaged premises adversely to both the mortgagor and the mortgagee a party defendant in such suit. And if he does so, and the fact of such adverse claim appears from the complainant's bill, the party thus made a defendant may demur to the bill for want of equity as to such defendant. *Banks v. Walker*, 438
7. Form and requisites of a decree for the foreclosure of a mortgage, and the sale of the mortgaged premises, where the mortgage is conditioned for the support of the widow of the mortgagee, and where the several owners of different parcels of the mortgaged premises are bound to contribute to her

support ratably. *Ferguson v. Kimball*, 616

8. After a default has been regularly entered, in a foreclosure suit, it will not be opened for the purpose of enabling the defendant to set up, as a defence, that the mortgage was given in violation of the restraining law; except upon the terms of paying the money or property actually received from the mortgagee. *Bard v. Fort*, 632

9. When a part of the mortgaged premises are claimed by a feme covert as her separate estate, the court will not set aside a regular default, in a foreclosure suit, to enable her husband to set up an unconscientious defence to the whole suit; but will make such an order as will protect the wife's claim to her separate estate in that portion of the premises. *ib*

*See* PLEADING, 2.

## FRAUD.

*See* BONA FIDE PURCHASER.  
DISCOVERY.  
HUSBAND AND WIFE, 10 to 14.  
MORTGAGE, 7.

## FRAUDS, STATUTE OF.

*See* AGREEMENT, 1, 2, 3.

## G

### GIFT.

1. The promissory note of the donor is not a good gift *inter vivos*; and the donor, or his representatives, may impeach such a note for want of consideration. *Craig v. Craig*, 76
2. But *it seems* that the draft of the donor, in favor of another, may operate as an appointment, or appropriation, of the fund upon which it is drawn, to the use of the donee. *ib*

*See* DONATIO MORTIS CAUSA.

## GUARDIAN AD LITEM.

*See* HUSBAND AND WIFE, 10, 11.

## H

### HABITUAL DRUNKARDS.

*See* LUNATICS.

### HEIR.

1. Where, subsequent to the death of a person who died intestate, without leaving sufficient personal estate to pay his debts, his heir at law conveyed to a creditor of the decedent a portion of the real estate which descended to him as heir at law, in part payment of the debt owing to the grantee by the decedent; *Held* that such conveyance was not entitled, even in equity, to a preference over the legal lien of a judgment previously obtained by another person, against the heir at law; it not appearing that there was no other real estate to pay the debts of the testator, after applying the personal property for that purpose. *Pierce v. Alsop*, 148
2. To entitle a creditor of a deceased debtor to a legal preference over a judgment creditor of the heir at law of the debtor, he must himself proceed to a judgment, or decree, against the heir at law, for the debt due from the latter, in respect to the lands descended from the deceased debtor. Or he must apply to the surrogate, for a sale of the land, to satisfy the debts of the decedent which the personal estate is insufficient to pay. *ib*

*See* DEBTOR AND CREDITOR, 5, 6.

### HUSBAND AND WIFE.

#### 1. Liability, of husband.

1. The liability of a husband, for the debt of his wife, and to be sued jointly with her in an action at law for the recovery of the same, terminates upon his being discharged under the bankrupt act. And no suit at law can be maintained against the wife during the life of the husband without joining her husband with her in the same suit. The remedy at law is therefore suspended as to the wife, or her estate, during the coverture. *Mallory v. Vanderheyden*, 9



2. *Liability of wife, for debts contracted by her before marriage.*

3. But there is nothing in the English bankrupt act, or in our act of 1841, by which the discharge of the husband is made a discharge of his wife, or a discharge of her separate estate, or of her reversionary interest in her real estate after the death of her husband, from liability for debts contracted by the wife before her marriage. *ib*

3. Where the wife survives her husband, who has been discharged under the bankrupt act, actions at law may be maintained against her for her debts, contracted before her marriage; in the same manner as if her husband had not been discharged from his liability. *ib*

4. Upon the death of the husband, debts contracted by the wife before the marriage, and which have not been recovered of her and her husband during her coverture, survive against her; and the estate of her husband is not liable therefor. *ib*

### 3. *Wife's separate estate.*

5. Where the husband survives the wife, although he is no longer liable for debts contracted by her while sole, however much he may have received by the marriage, her separate estate, in the hands of her personal representatives, is liable for those debts. *ib*

6. A creditor whose remedy at law, for the collection of a debt contracted by a married woman previous to her marriage, is suspended during the lifetime of the husband, by his discharge under the bankrupt act, may file a bill in chancery, against the husband and wife, to reach stocks standing in her name, for her sole and separate use, and other property held in the same manner, and which belonged to her before her coverture; and may have such separate property applied to the payment of his debt. *ib*

7. Where the real estate of a married woman has been converted into personalty by operation of law, during her lifetime, it will be disposed of by the court, after her death, in the same manner as if she had herself converted it into personal property, previous to her death. *Graham v. Dickinson*, 169

8. Where the interest of a husband in his wife's real estate is sold under a judgment recovered against him, his right to redeem the premises from the sale is at an end at the expiration of twelve months. And if the original purchaser, or a redemption creditor, obtains the legal title at the end of three months thereafter, the wife has no right to redeem, upon paying the amount of the original bid and interest; although she is then entitled to a decree of separation. *Sackett v. Giles*, 204

### 4. *Survivorship of wife.*

9. Where stocks are conveyed to the husband and his wife jointly, and she outlives her husband, who dies without having disposed of the stocks, the wife takes the whole by survivorship. *Craig v. Craig*, 76

### 5. *Suits between.*

10. *To annul marriage on the ground of fraud.*] If the defendant, in a suit by the husband, to annul a marriage on the ground of fraud, is an idiot, the complainant must procure the appointment of a guardian ad litem to appear and defend the suit for the wife. *Montgomery v. Montgomery*, 132

11. Where no guardian ad litem is appointed for the defendant, in such a case, the complainant will derive no benefit from the tacit admission of the fraud charged in the bill, arising from the wife's suffering such bill to be taken as confessed against her. *ib*

12. A court of equity will not annul a marriage contract as having been fraudulent, upon the mere admission, by the defendant, of the facts charged in the bill. *ib*

13. A suit to annul a marriage, on the ground that the consent of one of the parties thereto was obtained by fraud, must be brought within six years after the discovery, by the aggrieved party, of the facts constituting the fraud. *ib*

14. The meaning of the provision of the statute relative to suits of that nature, which declares that a marriage may be annulled on account of force or fraud, during the lifetime of the parties, or one of them, is not that the suit can be brought at any distance of time

after the right to institute it occurred, provided either of the parties is still living, but that the suit can only be brought during the lifetime of the parties, or during the life of one of them, and not afterwards. *ib*

15. *For a separation.*] Where a bill was filed by the wife, against her husband, for a separation from bed and board, on account of alleged cruel treatment, and the assignees of the husband's interest in the complainant's real estate were made defendants, and the husband died before a decree, but the wife had failed to make out a case which would have entitled her to a decree of separation if the husband had lived until the hearing; *Held*, that the other defendants were entitled to have the bill dismissed, as to them, with costs. *Sackett v. Giles*, 204

16. The general liens of judgment creditors of the husband, upon the interest of the latter in the real estate of his wife, and which liens have not been converted into an interest in the land itself at the time of the filing of a bill by the wife, against her husband, for a separation, are subservient to the paramount right of the wife to the immediate use of the land; upon her substantiating her right to a decree of separation, for the misconduct of the husband. *ib*

17. But where the interest of the husband in his wife's real estate is sold, by virtue of an execution issued upon a judgment recovered against him, before a separation has taken place between him and his wife, and before the filing of a bill for a separation, by the wife, and when the parties were living together as husband and wife, the purchaser of such interest at the sheriff's sale is entitled to protection as a bona fide purchaser, where he had no notice of her right to a separation. *ib*

6. *Suits respecting wife's property.*

18. A bill to set aside a will, which secures to a married woman and her issue, a share of the property of the testator, for her separate use during coverture, is improperly filed by the husband in the names of himself and his wife; the interests of the complainants being in conflict. *Alston v. Jones*, 397

19. In such a case, the wife, instead of being joined with her husband as a complainant, should be made a defendant. *ib*

See FORECLOSURE SUITS, 1, 2.  
PRESUMPTIONS, 2.

## I

### IDIOT.

See HUSBAND AND WIFE, 10.

### INJUNCTION.

An injunction will not be granted, to restrain the defendant from selling personal property, mortgaged to the complainant, under an execution against the mortgagor, which execution was issued prior to the execution of the mortgage. *Warner v. Paine*, 630

See LITERARY PROPERTY.

### INSOLVENT CORPORATIONS.

1. The officers of an insolvent corporation are not entitled to have their salaries paid in full, in preference to the debts of other creditors. They are only entitled to be paid their ratable proportion of the assets of the company as between them and other creditors. *Matter of the Croton Insurance Company*, 643

2. The receiver of an insolvent corporation may, upon application to the court, be authorized to compromise disputed and doubtful claims against the company, by the allowance of so much of such claims as he may deem just and equitable. *ib*

3. He may also be authorized, in any case where he may deem it expedient, and for the interest of the creditors and stockholders of the company to do so, to compromise with debtors of the corporation who are unable to pay in full; upon the receipt of such part of the debts due from them as he shall deem reasonable and for the best interests of such creditors and stockholders of the company. *ib*

4. Such receiver will not be authorized to re-insure for risks already assumed by the company, and to pay the new premium out of the assets of the company. But his proper course is to refund the unearned portion of the premiums received, where the assured are willing to do so, and let them re-insure for themselves. *ib*

INSURANCE.

1. Where a corporation has underwritten a policy, and afterwards causes itself to be reinsured, and after the loss of the property insured such corporation becomes insolvent, the person originally insured has no equitable lien, or preferable claim, upon the sum of money due on the contract of reinsurance. But that fund belongs to all the creditors of the insolvent corporation ratably; under the provisions of the revised statutes relative to proceedings against corporations in equity. *Herckenrath v. The Amer. Mutual Ins. Co.* 63
2. The risk which the first insurer had assumed, forms, as between him and the reinsurer, the subject matter of the reinsurance. And such reinsurance is a new contract, entirely distinct from the first, which still subsists in all its force. *ib*
3. From the nature of the contract of reinsurance, and the want of privity between the reinsurer and the person first insured, it does not come within the rule that the principal creditor, in equity, is entitled to the benefit of all counter bonds and collateral securities given by the principal debtor to his surety. *ib*
4. It seems that upon a contract of reinsurance the reinsurer is bound to pay the amount which the original insurer becomes legally liable to pay to the assured in consequence of the risk assumed, and not merely the amount which the original insurer actually pays in consequence of the risk assumed by him. *ib*

INTEREST.

See BOND.

ISSUES AT LAW.

1. Where the verdict of the jury, upon the trial of issues sent to a court of law to be tried, is against the weight of evidence, a new trial will be granted by the court directing the trial. *Lansing v. Russell,* 323
2. Issues were awarded, to try the question as to the genuineness of a grantor's signature to two deeds, one to his daughter and another to his son-in-law, and as to the competency of the grantor to execute such deeds; and the jury having found in favor of the validity of both deeds, a motion was made for a new trial; upon which motion it appeared that it was the grantor's intention to make the shares of all his children in his estate equal. And the deed to his daughter professing to have been given with the view of putting her upon an equality with his other children, and the court being satisfied, from the evidence, that the grantor could not have understood the effect of that deed upon the division of his property, and the grantees having failed to prove that equality among the grantor's children would be produced by allowing both deeds to stand, a new trial of the issues was ordered, so far as they related to the deed to the grantor's daughter. *ib*

J

JUDGMENT.

1. Where a judgment has been recovered against a person on the ground that he has received moneys to the use of the plaintiff, under an assignment made and a judgment given in trust for the benefit of the latter, the defendant is estopped from litigating the question again—in a creditor's suit founded upon such judgment—either as to the fact of its being a fiduciary debt, or as to the amount received in his fiduciary character. *Kingsland v. Spalding,* 341
2. A decree, sentence, or judgment, of a court of competent jurisdiction, is conclusive upon the parties, in a future litigation of the same question between those parties, or those claiming under them; whether such question arises directly or collaterally in the subsequent litigation; provided the question of estoppel is brought before the court in the proper form. *ib*

3. Where the former decision of the same matter can be set up in pleading, as an estoppel, the party who wishes to avail himself of it must plead it in bar of the further litigation of the same matter. But in those cases where the form of proceeding does not allow of special pleading, it may be given in evidence; and is conclusive upon the parties, the court, and the jury. *ib*

4. Where a judgment has been recovered against the principal debtor and his sureties, and a third person afterwards agrees with the creditor to become security for the payment of the debt, upon an agreement with such creditor that the new surety shall have the benefit of the judgment, for his protection and indemnity, he has a prior equity over the first sureties, and is entitled to enforce the collection of the judgment for his own benefit and protection. *La Grange v. Merrill*, 625

5. In ordinary cases, although a judgment technically changes the nature of the debt, it is still in fact the same debt which was due at the commencement of the suit; and if contracted previous to the institution of proceedings in bankruptcy against the debtor it will be barred by his discharge, where such discharge is obtained subsequently to the entry of the judgment. *Johnson v. Fitzhugh*, 360

6. Since the act of May, 1840, concerning costs and fees in courts of law, &c. it is not necessary for the registers or clerks of the court of chancery, or the clerks of the supreme court, to docket decrees or judgments in the books of their own offices; and if done, it will not affect the rights of either of the parties to the decree or judgment, or cast a cloud upon the title of the defendant in such suit to his real estate. *ib*

See DECREE.  
ESTOPPEL, 8.  
EVIDENCE, 4, 5.  
MORTGAGE.

#### JURISDICTION.

1. Where rights exist, and the remedy at law is inadequate to meet the justice and equity of the case, it is a part of the ordinary jurisdiction of the

court of chancery to provide for such a case. *Mullory v. Vunderheyden*, 9

2. A court of equity will not entertain jurisdiction of a case for the mere purpose of giving a compensation in damages, for an injury sustained by a false representation; where the remedy at law, by an action on the case, is clear and perfect, and where no discovery is asked for, from the defendant. *Shepard v. Sanford*, 127

3. A court of equity has no jurisdiction to restrain or punish crime, or to enforce the performance of a moral duty, except so far as the same is connected with the rights of property. *Hoyt v. Mackenzie*, 320

4. The court of chancery, upon a mere petition in the original suit, cannot make a personal decree or order against a purchaser *pendente lite*, who is not a party to the suit, whereby property not in litigation in such suit can be affected. But to reach and affect such lands, a new or supplemental bill, against such purchaser, is necessary. *Livingston v. Freeland*, 511

5. Where the parties have submitted themselves to the jurisdiction of the court of chancery, without objection, the chancellor will not refuse to take jurisdiction of the case, and to make a proper decree therein, merely upon the ground that the complainant had a perfect remedy by an action at law. *The Bank of Ulica v. Mercereau*, 528

See COSTS, 13.  
EXECUTION, 5, 6, 7, 8.  
LITERARY PROPERTY.  
PLEADING.

#### L

#### LANDLORD AND TENANT.

See ESTOPPEL.  
LEASE.

#### LAPSE OF TIME.

Where the husband had a contract for the purchase of land upon which he made a mere nominal payment, and he afterwards died without leaving

any means of paying for such lands, leaving a wife and several infant children surviving him, and the wife subsequently paid for the land and took a deed thereof in her own name, and afterwards conveyed the same with warranty; and her children after they became of age waited from nine to fifteen years, and until their mother had become insolvent, before they attempted to assert their claim, in equity, to the land; *Held*, that their bill was properly dismissed by the vice chancellor on account of their delay in instituting the suit. *Spoor v. Wells*, 199

### LEGACY AND LEGATEE.

1. As a general rule, a legatee may sue the executor, for his own particular legacy, without making the residuary legatees, or any other legatees, parties to the suit. *Aliter* where one of the residuary legatees sues for his share of the residue; an account of the estate being necessary, in that case. *Cromer v. Pinckney*, 466
2. Where a suit is brought for the recovery of a particular legacy, which suit, if successful, will reduce the fund bequeathed to the residuary legatee, the interest of the latter will be protected by representation; the executors representing the residuary estate and those interested therein, for the purpose of protecting it against all prior claims upon it which might diminish its amount. *ib*

### LEASE.

1. An assignment by the lessor, of the rent of leasehold premises, creates such a privity of estate between the assignee and the lessee, that the former may maintain a suit in his own name for the rent which accrues and becomes payable, while such privity of estate exists. *Childs v. Clark*, 52
2. Where a deed of premises is given, subject to a lease thereof for a term of years, previously given by the grantor, and subject to the rights of a person to whom the lessor has assigned his interest in the rents reserved in and by such lease, for a portion of the term—the rights of such assignee appearing upon the face of the deed—such deed is constructive no-

tice to the purchaser of the premises, and also to his assigns, of the rights of the assignee of the rent for such portion of the term; although the assignment of the rent has not been recorded. *ib*

3. And the grantees of such purchaser will take their several interests in the premises as assignees, in law, of the lessee, during that portion of the term; and subject to the rights of the assignee of that portion of the rent; and subject to the payment of the rent, or of their respective portions thereof, which accrues or becomes payable during the times they hold and enjoy the premises as such assignees. *ib*
4. If the conveyance to each purchaser of a portion of the premises, was for the whole term, the right of action against them, for rent, exists, as to a portion of the rent at least, although some of them are only assignees of undivided interests in the premises. *ib*
5. The privity of estate exists between the landlord and the assignee of the lessee, *pro tanto*, where the lessee only assigns a part of the premises, if such assignment is of his whole interest and estate in that part of the premises. *ib*
6. The distinction between an assignment and an under tenancy depends solely upon the quantity of interest which passes by the assignment, and not upon the extent of the premises transferred thereby. *ib*
7. The assignee of a lease is only liable, as such assignee, for the rent which accrued or became payable, or for other covenants broken, while he was such assignee. And he may discharge himself from all further liability, by assigning his interest in the premises to a stranger, even if the assignee is a beggar; provided he actually relinquishes the possession of the premises, and all interest therein, so that the assignment is not merely colorable, or fraudulent. *ib*
8. There being no privity of contract between the lessor and the assignee of the lease, the latter is personally liable only in respect to his privity of estate in the land, or in respect to covenants running with the land, for the rent which accrued and became payable after such privity of estate commenced, and before it terminated; or while he en-

- joyed, or had the right to enjoy, the premises or some part thereof, as an assignee of the lease. *ib*
9. A mere mortgagee of the term, who has not entered under his mortgage, is not personally liable, as an assignee of the interest of the lessee in the premises. *ib*
10. Whether the assignees of the lessee's interest in undivided portions of the leasehold premises should be sued jointly for the whole rent, or separately for their respective portions thereof? *Quære.* *ib*
11. Whether the assignee of a part only of the leasehold premises, but of the whole of the lessee's interest in that part, is liable in law for the whole rent, or for the whole damage for the breach of any of the covenants in the lease which extend to the whole premises? *Quære.* *ib*

*See* AGREEMENT, 4, 5, 6, 7, 8.

## LETTERS.

*See* LITERARY PROPERTY.

## LITERARY PROPERTY.

- At common law, the author of a book, or other literary production, whether in the shape of letters or otherwise, has a right of property therein, until it has been published with his assent; and he may maintain an action for his damages arising from a surreptitious publication thereof. *Hoyt v. Mackenzie*, 320
- And a court of equity will, by injunction, restrain the publication of letters written by the complainant, if they are of any value to him as literary productions; or if his right to multiply copies thereof is of any value to him. *ib*
- Abiter*, however, in relation to letters written to the complainant by other persons, without any authority, express or implied, being given to him to publish them. *ib*
- A letter cannot be considered of value to the author, for the purpose of publication which he would not willingly consent to have published. *ib*
- A court of equity ~~shall~~ properly exercise its power to restrain the publication of private letters, on the ground of protecting literary property, where they possess no attribute of literary composition. *ib*
- Although it may be evident that the publication of private letters is with the view of wounding the feelings of individuals, or of gratifying a perverted public taste, a court of equity has no jurisdiction to restrain their publication, when they are of no value as literary property. *ib*

## LIMITATION OF ESTATES.

*See* CONTINGENT REMAINDER.

## LIMITATIONS, STATUTE OF.

- An equitable claim, upon which a bill in chancery could have been filed previous to the first of January, 1830, and where the complainant was under no legal disability, is barred, by the provisions of the revised statutes, at the expiration of ten years after the revised statutes went into operation. *Spoor v. Wells*, 199
- The old statute of limitations is only applicable to suits in equity for claims as to which the right to sue existed previous to January, 1830, where there is a concurrent jurisdiction, at law and in equity, in reference to the subject of the suit; but it does not apply to cases which are exclusively of equitable cognizance. *ib*
- To enable a defendant to take advantage of the statute of limitations, upon demurrer, it must distinctly appear, by the bill itself, that the complainant's remedy is barred by lapse of time. *Muir v. Trustees of the Leake and Watts Orphan House*, 477

## LUNATICS.

- Where a bill is filed by the committee of a lunatic, to set aside an act done by such lunatic, upon the ground of his incompetency, it is not necessary that the lunatic himself should be made a party; but he may be joined, as a party, with his committee. *Gorham v. Gorham*, 24

1. In all other cases, the settled practice in England has always been, either to join the committee with the lunatic, in bringing suits in chancery for his benefit, or to file the bill in the name of the lunatic, by his committee. And where the lunatic is not made a party to the bill, or information, in his behalf, it is a good cause of demurrer. The same rules are applicable to suits brought in the courts of equity in this country, for the benefit of lunatics. *ib*
2. When it is said, by English writers, that idiots and lunatics must sue by their committees, it is not meant that the suit is to be brought by the committee in their own names, merely describing themselves as the committee of the lunatic; but that the suit is to be brought in the name of the lunatic, stating that he sues by the committee of his estate, naming them, as in the case of an infant suing by his next friend; or that the suit should be prosecuted in the names of the lunatic, and of his committee. *ib*
3. A bill filed by the committee of a lunatic, in their own names, in which they only describe themselves as his committee, is a bill by the committee alone; and is not the bill of the lunatic, by his committee. And a decree in favor of the complainants would not be a decree in favor of the lunatic. *ib*
4. A bill filed by a committee, in that manner, praying for a partition of lands and for an account and payment of rents and profits of the share of the land belonging to the lunatic, is defective in form. And if the objection that the lunatic is not made a party to the suit, with his committee, is set up by the defendant, as a special cause of demurrer, no part of the bill can be sustained. *ib*
5. The objection that the lunatic himself is not made a party complainant, in a suit brought by his committee in relation to personal estate, may be waived by the defendant's neglecting to set it up by demurrer or answer; and it cannot be raised merely by a general demurrer for want of equity. *ib*
6. The court of chancery, during the continuance of the lunacy, by statute, has the whole control of the personal estate and choses in action of the lunatic. And it can transfer the title to the same, by directing a sale by the committee; and it may direct the committee to release any right of action in relation thereto, as may be equitable and just. So that when a matter relating to the personal estate of the lunatic has been fairly litigated by the committee, in that court, and decided against them, the court may protect the defendant against a new suit, by the lunatic or his representatives, although the lunatic was not a formal party to the suit brought by his committee; by directing the committee to transfer the property which was in litigation, to the defendant, or to release him from any further claim on account thereof. *ib*
7. The question whether a suit can be commenced in the name of a committee of a lunatic, for the recovery of real estate, or to establish the title to the same, or whether a suit in partition can be instituted in the name of such committee without joining the lunatic as a party, is wholly unaffected by the act of 1845, authorizing committees to sue in their own names. *ib*
8. A lunatic is a necessary party to a bill, filed by his committee, for the partition of his real estate. For a decree in partition, upon a bill filed by the committee alone, and to which the lunatic is not a party, will not transfer the legal title to his undivided share of that portion of the premises which is set off to the defendant in severalty. *ib*
9. There is no statute, in this state, authorizing the committee of a lunatic, or of an habitual drunkard, to prosecute a suit for partition in their own names alone; or authorizing another person to prosecute a partition suit against them without making the lunatic, or the habitual drunkard, who is an actual owner of an undivided part of the premises, a party to the suit. And the only way in which a legal partition can be made of the real estate of a lunatic, or an habitual drunkard, except by an agreement between the committee and the other tenants in common, with the concurrence of the court, is to make him an actual party to the suit for partition. *ib*
10. By making a lunatic, or an habitual drunkard, a party to a suit for partition, his legal title to that portion

of the premises which may be set off to the adverse party, in severalty, will pass, without any conveyance, either from the lunatic, or the habitual drunkard, or from his committee; under the provisions of the revised statutes relative to the partition of lands. *ib*

See TRUSTS AND TRUSTEES, 1, 2.

## M

### MARRIAGE.

See HUSBAND AND WIFE.

### MAXIMS.

1. The maxim that custom is the best interpreter of the law, applied to the form of a comptroller's deed given on a sale of land for taxes; where it appeared that it had been the custom to execute deeds in the same form, for more than a quarter of a century. *The Bank of Ulica v. Mersereau*, 528
2. The expression of Lord Coke, that common opinion is good authority in law, does not apply to a mere speculative opinion in the community as to what the law upon a particular subject is. But when such opinion has been frequently acted upon, and for a great length of time, by those whose duty it is to administer the law, and important individual rights have been acquired or are dependant upon such practical construction of the law, it is entitled to great weight. *ib*

### MORTGAGE.

#### 1. *Rights of mortgagor and mortgagee.*

1. M. being the owner of a farm, in January, 1838, mortgaged the same to R. to secure the payment of \$6000 and interest. In June thereafter he again mortgaged it to P. the complainant, to secure the payment of \$7000 and interest. In March, 1842, he gave to P. an absolute deed of the premises, and at the same time assigned to him his interest in two previous mortgages thereon; and took back from P. an instrument, not under seal, certifying that he had received such con-

veyance and assignment, and was to sell and dispose of the farm in such lots, tracts, or parcels, and for such price, and upon such terms, as he might deem expedient; and was to apply the proceeds of such sales, &c. to the payment of M.'s bond and mortgage to himself and to the payment of the prior bond and mortgage to R.; and pay the surplus, if any, to M. And if it should be necessary or expedient to foreclose either of the two last mentioned mortgages, to perfect the title to the premises, the costs of the foreclosure were to be paid, as part of the necessary expenses of the execution of the trust. Subsequently P. filed a bill to foreclose the mortgage given to him by M. and obtained the usual decree for foreclosure and sale, with a decree over against M. for the deficiency, if any. At the master's sale, the premises were bid in by P. for the sum of \$200, subject to the prior mortgage to R.; leaving a deficiency, due upon the decree, of \$8355.59; for which amount the decree was docketed against M. the mortgagor. P. went into possession of the premises and received the income thereof, kept down the interest upon the prior mortgage, and paid the taxes; but the income was insufficient for that purpose. On a bill filed by P., praying that the balance due to him upon his own bond and mortgage, and the interest which he had paid upon the prior bond and mortgage beyond the income of the premises might be ascertained; that the premises might be sold; that he might be permitted to bid at the sale, for the protection of his rights, &c.; and might be permitted to enforce his former decree for the deficiency; *Held* that this was a case in which the complainant was entitled to relief; and a demurrer to the bill was overruled. *Parsons v. Mumford*, 152

#### 2. *Held also*, that taking the whole

transaction together—the conveyance from M. to P., and the written defeasance, and the subsequent purchasing in of the premises by P., at the master's sale—it must be considered merely as a further security of the debt due to P., and that the interest of P. in the premises was in the nature of a mortgage merely. *ib*

3. *Held further*, that P.'s interest in the premises was subject to an equity of redemption in M., and was not strictly a trust which could enable P. to con-



vey a good title to a purchaser who was acquainted with the facts of the case. *ib*

2. *Delivery and assignment.*

4. Where the payee of a bond and mortgage, given for the benefit of a third person, has consented, beforehand, to take such bond and mortgage for the purpose of assigning them to the person whose debt is intended to be secured thereby, it is not necessary that any particular formality should be observed in delivering the instruments and obtaining his assignment thereof. Placing them before him, for his signature to the assignment, is a good delivery; and his executing such assignment is an absolute acceptance by him of the bond and mortgage. *The Lady Superior, &c. v. McNamara,* 375

b. The delivery of the assignment to the mortgagor, for the benefit of the assignee, is also a good delivery of the assignment, to the latter, by the mortgagee. And the bringing of a suit by the assignee to foreclose the mortgage, as such assignee thereof, is an assent to the assignment; and relates back to the time when such assignment was delivered to the mortgagor for the benefit of the real party for whose security the mortgage was given. *ib*

6. It is not a valid objection to an assignment of a bond and mortgage, especially in a court of equity, that the assignee is not described therein by name. It is sufficient if the assignment is made to a person in a particular character sustained by him; provided the description identifies the assignee with as much certainty as if he had been described by name. *ib*

7. Where a person obtained the assignment of a bond and mortgage, from the owner thereof, by false pretences, amounting not only to a gross fraud but also to a felony; and transferred the same to a third person for less than their value, and under circumstances calculated to put the latter upon inquiry; *Held* that no title passed to the purchaser, under the assignment to him; and that the owner of the bond and mortgage was entitled to a decree declaring the assignments fraudulent and void, as against him, and directing the purchaser to reassign the bond and mortgage; and to refund the amount which such pur-

chaser had collected upon the same, with interest. *Peabody v. Fenham,* 451

8. Where a bond and mortgage are assigned as security for a debt, a subsequent assignee takes the same subject to the right of the original assignor, to redeem the securities, upon paying the amount of the loan for which such bond and mortgage were pledged, with interest. *Sweet v. Van Wyck,* 647

3. *Priority and lien.*

9. Where a bond and mortgage are actually given to secure a particular debt mentioned therein, the mortgagee cannot, as against subsequent purchasers or incumbrancers, hold the mortgage as a lien for an entirely distinct and separate debt, upon parol proof that it was intended to cover that debt also. *The Bank of Utica v. Finch,* 293

10. But where the mortgage is given to secure a particular debt, with a condition to be void upon the payment of that debt, the mortgagee does not lose his security by the mere extension of the time of payment; although that extension is in the form of a renewal of the note which was given as a collateral security for the payment of the same debt; where it was not the intention of either party to discharge the mortgage security by such renewal of the note. *ib*

11. The proper way of bringing forward a defence which arises after the putting in of the defendant's answer is by obtaining leave to file a supplemental answer, or leave to file a cross-bill. *Tripp v. Vincent,* 613

12. The release of a debt which is secured by a mortgage may discharge the lien of the mortgage upon the land. But where the debt is secured by the personal obligation of the mortgagor, as well as by a mortgage upon land, the debt will still exist, as a valid claim against the land, although the creditor consents to discharge the personal liability of his debtor, and to look to the land alone, upon which the debt is a lien, for the payment thereof. *ib*

13. Whether the debt itself was intended to be discharged, or only the personal liability of the debtor, is in such cases a question of fact; and

sing either from extrinsic circumstances, or upon the construction of the instrument which is claimed to be a discharge of the debt. *ib*

14. By the mortgagor's conveyance of mortgaged premises, to a purchaser, *subject* to the payment of the mortgage by the latter, the land becomes the primary fund for the payment of the debt due to the mortgagee. And releasing the personal liability of the mortgagor, who in equity is then only secondarily liable, leaves the mortgage in full force against the land; in the same manner as if the mortgagor had been discharged from his personal liability under the bankrupt act. *ib*

#### 4. To secure future advances.

15. A mortgage, or a judgment, may be given to secure future advances; or as a general security for balances which shall be due, from time to time, from the mortgagor, or judgment debtor. *The Bank of Utica v. Finch*, 293

16. And this security for future advances may be taken in the form of a mortgage, or judgment, for a specific sum of money, sufficiently large to cover the amount of the floating debt intended to be secured thereby. *ib*

See BONA FIDE PURCHASER, 2, 4.

### MULTIFARIOUSNESS.

1. Multifariousness, properly speaking, is where different matters, having no connection with each other, are joined in a bill against several defendants, a part of whom have no interest in, or connection with, some of the distinct matters for which the suit is brought; so that such defendants are put to the unnecessary trouble and expense of answering and litigating matters stated in the bill, in which they are not interested, and with which they have no connection. *Newland v. Rogers*, 432
2. A simple misjoinder of different causes of complaint, between the same parties, and which causes cannot conveniently and properly be litigated together, is sometimes called multifariousness; but the ground of objection, in such cases, depends upon an en-

tirely different principle from multifariousness, properly so called, and is a mere question of convenience. *ib*

3. The court of chancery abhors a useless multiplication of suits between the same parties, and endeavors to prevent it, as far as practicable. Hence it will not allow separate bills to be filed for different parts of the same account, between the same parties; although the account relates to transactions which are not necessarily connected with each other. *ib*
4. Accordingly, to sustain the objection that several distinct matters and causes of complaint between the same parties, are improperly joined in the same bill, such matters must be of such different natures, or the forms of proceeding in relation to such several matters must be so different, that it would be improper, or very inconvenient, to litigate the same in one suit. *ib*
5. There is no general principle, of the court of chancery, that distinct matters, between the same parties, who sue or are sued in the same right or capacity, cannot be united in the same bill. On the contrary, it is settled that matters of the same nature, between the same parties, although arising out of distinct transactions, may properly be joined in the same suit. *ib*

### N

#### NEXT OF KIN.

1. Under the provisions of the reviser's statutes no one can be liable to account to the next of kin, as an executor of his own wrong. Where persons have received and disposed of the property of a testator, without having been duly appointed his executors, or duly authorized to act as such, they are liable to his personal representatives, whenever such representatives shall have been appointed; but not to persons claiming to be next of kin of the decedent, merely. *Muir v. Trustees of the Leake and Watts Orphan House*, 471
2. The proper course for the next of kin, in such a case, is to procure the appointment of an administrator, and have a suit instituted in his name, to

recover the property from any person into whose hands it may have come, and who has converted it to his own use. *ib*

- 3 Where it appears that the will of a testator has been duly admitted to probate, so as to render the appointment of the executors valid, and to give the next of kin a claim upon them for the property of the testator not validly and effectually disposed of by will, such next of kin, in a bill by them against the executors, claiming that the decedent died intestate, and asking for an account of the personal estate, are bound to state what the testamentary paper was upon which the surrogate granted letters testamentary to the executors; so that the court may see whether the testator in fact died intestate as to any part of his personal property. *ib*

#### NEW TRIAL.

*See* ISSUES AT LAW.

#### NOTICE.

*See* BONA FIDE PURCHASER.  
FERRY.  
LEASE, 2.  
PLEADING, 1.  
POSSESSION.

#### P

#### PARTIES.

1. Persons having adverse or conflicting interests in the subject of the litigation should not be joined as complainants in the suit. *Alston v. Jones*, 397
- 2 To enable the court of chancery to settle the question, in a suit between a mortgagee and a judgment creditor, whether an execution has been issued for more than was actually due upon the judgment, the judgment debtor is a necessary party. *Warner v. Payne*, 630
- 3 The judgment debtor is also a necessary party to a bill to set aside an assignment of the judgment, upon the ground of its having been made in

violation of the statute restraining attorneys, solicitors, and counsellors from purchasing notes and choses in action for the purposes of prosecution. *ib*

*See* AGREEMENT, 8.

BILL OF DISCOVERY.

BILL OF INTERPLEADER, 2.

HUSBAND AND WIFE, 18, 19

LUNATICS.

#### PARTITION.

*See* ANNUITY.

LUNATICS, 8, 9, 10, 11.

#### PARTNERSHIP.

1. Where a partnership is dissolved by the death of one of the copartners, or where one or both of the copartners become bankrupt, or they are discharged under the insolvent acts, so that their property is placed in the hands of the assignees appointed by law to make distribution thereof, it is administered, in courts of equity, by applying the copartnership funds, in the first place, to the payment of the debts of the firm; and the individual funds of the several copartners to pay their individual debts respectively, before paying joint debts out of the same. *Kirby v. Schoonmaker*, 46
2. But where the copartners are administering their own funds, the copartnership creditors have no specific or preferable lien upon the joint funds; nor have the individual creditors any lien or priority of claim upon the separate property of their debtors. *ib*
3. It is only where neither the joint nor the separate creditors of the persons composing the firm can reach the property of their debtors, so as to obtain satisfaction by execution at law, that the equitable principle is applied of paying joint creditors out of the partnership property, and individual creditors out of the separate property of their debtors; where there is not enough to pay both. *ib*
4. Copartners may assign their individual property, as well as their partnership property, to pay the joint debts of the firm; thereby giving the creditors of the firm a preference, in pay-

ment out of the separate estate of the assignors, over the separate creditors. *ib*

5. And each copartner, with the assent of the others, has the corresponding right to give his individual creditors a preference in payment out of the share of the effects of the firm which, as between him and his copartners and without reference to the debts for which they are all jointly liable, is legally his own property. *ib*

6. Copartners may make an assignment of their respective interests in the partnership property to trustees, giving a preference in payment to the individual creditors of each copartner, out of his share of the partnership funds. But a partner who is insolvent and unable to pay the debts of the firm, has no right to assign his share of the partnership effects to pay the individual debts of his copartner, for which neither he nor his property is legally or equitably liable. *ib*

7. There is an equity existing between the members of an insolvent copartnership, by virtue of which any of them may insist that the copartnership effects shall be applied to the payment of the debts of the firm in preference to the payment of the private debts of the individual partners; and this gives to the creditors of the firm a quasi equitable lien upon the copartnership effects, if the members of the firm, or any of them, choose to give effect to such lien, by working it out for the benefit of the joint creditors. *ib*

8. But this equity of the members of the firm as between themselves, does not deprive them of the right to apply the partnership effects to the payment of their joint and separate debts as they please, provided no injustice is done to any of their creditors. *ib*

## PLEADING.

### 1. Bill.

1. Where a bill was filed, by persons claiming the exclusive right to a ferry, to obtain a decree restraining the defendant from keeping a ferry at the same place, and such bill alleged that the defendant had established a ferry there, in violation of the rights of the complainants; and that he was using

the same in pursuance of a pretended license from some court or person, but that if any license had been granted to the defendant, the same was granted in fraud of the complainants' rights, and without any legal notice to them but such bill contained no allegation that the complainants were the owners of the land through which the road adjoining the ferry ran; Held that the averment, as to the want of notice to the complainants, was not material for any of the purposes of the suit; and that the defendant was not bound to answer it. *Wiswall v. Wandell*, 312

2. Where a person executes a mortgage upon premises which he has previously contracted to sell to another, and the mortgagees file a bill to foreclose such mortgage, making the purchaser a party thereto, if they mean to insist that they are entitled to a preference over such purchaser, as bona fide mortgagees without notice, the bill should state that such purchaser claims an interest under a contract, or a pretended contract, to purchase, prior to the mortgage; and it should also allege that if he had any such interest the complainants had no notice thereof at the time they took their mortgage. And the bill should show the other facts which are necessary to entitle the complainants to protection as bona fide purchasers. *The Bank of Orleans v. Flagg*, 316

3. Where a particular allegation is inserted in a bill, for the purpose of transferring the jurisdiction from a court of law to a court of equity, the bill, or rather that particular allegation in the bill, must be verified by the oath of the complainant, or by the oath of some other person, on his behalf, who knows the fact. *Alston v. Jones*, 397

4. And where such allegation covers the whole equity of the bill, the defendant need not demur specially to that allegation, on the ground that it is not verified, but may demur generally; stating for cause of demurrer that the bill is not verified by oath. *ib*

### 2. Answer.

5. After a defendant has answered the original bill, and the proofs have been taken in the cause, it is irregular and unauthorized for him, either to answer the matter of the original bill anew

or to put in an answer to a supplemental bill, filed for the purpose of bringing additional parties before the court; and to which supplemental bill he is not a party. *The American Life Ins. and Trust Co. v. Bayard*, 610

See DISCOVERY.  
EVIDENCE, 2, 3.  
PRACTICE, 3, 4, 5.

### 3. Plea.

6. Where to a bill, by a creditor, against his debtor and the assignee of the latter, under an assignment for the benefit of creditors, praying for an account of the assigned property, and for the payment of the complainant's debt, and other debts provided for in the assignment, the assignee pleaded that the assignor, after making the assignment, presented his petition to the district court, praying that he might be declared a bankrupt pursuant to the act of congress on the subject; and that such court made a decree appointing an assignee of his estate and effects; whereby all the property assigned by the debtor to the defendant became vested in the assignee in bankruptcy; *Held* that the plea did not contain the necessary averments to show that the debtor was legally declared a bankrupt, so as to vest his property in the assignee in bankruptcy. *Seaman v. Sloughton*, 344

7. To show that the court had jurisdiction to proceed, upon the petition of a debtor, under the voluntary provisions of the bankrupt act, the plea setting up a discharge in bankruptcy, or a right acquired under the decree therein, should state that the petition set forth a list of the petitioner's creditors and an inventory of his property, and that such petition was duly verified. It should also distinctly appear that the bankrupt owed debts which had not been created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity. *ib*

### POSSESSION.

Where a purchaser of premises is in the actual possession thereof, by his tenant, at the time of the giving a mortgage thereon to others, by the vendor, such possession is constructive notice to the

mortgagees, of the equitable rights of such purchaser; and they are not entitled to protection as bona fide mortgagees without notice of his rights. *The Bank of Orleans v. Flagg*, 316

See AGREEMENT, 2, 3.  
ESTOPPEL, 1, 2.

### POWERS.

See EXECUTORS AND ADMINISTRATORS  
6, 7.

### PRACTICE.

1. Where it appears that the complainant is entitled to relief, but his bill is not properly framed to obtain such relief, the bill should not be dismissed absolutely; but it should be dismissed without prejudice to his rights in any future litigation. *Wilber v. Collier*, 427

2. After the proofs in a cause have been closed, ex parte affidavits cannot be received for the purpose of proving that a release of a witness' interest was executed and delivered to the witness previous to his being examined. *The Bank of Utica v. Mersereau*, 528

3. After a defendant has answered the original bill, and the proofs have been taken in the cause, it is irregular and unauthorized for him, either to answer the matter of the original bill anew, or to put in an answer to a supplemental bill, filed for the purpose of bringing additional parties before the court; and to which supplemental bill he is not a party. *The American Life Ins. and Trust Co. v. Bayard*, 610

4. And if the complainant, by mistake, files a replication to an answer thus put in, he will be permitted to withdraw the same, and to move to take the answer from the files of the court. *ib*

5. And if permitting the answer put in by the defendant to remain upon the files of the court will embarrass the proceedings and raise questions which will be productive of delay, it will be ordered to be taken off the files. *ib*

6. Upon a rehearing, the case is *aper*

as to the party upon whose application the order for a rehearing was granted, only as to those parts of the decree which were complained of in the petition upon which that order was founded. *Ferguson v. Kimball*, 616

7. In what cases sworn bills may be amended, although the amendments contradict material allegations in the original bill. *Hall v. Fisher*, 637

See APPEAL.

### PRESUMPTIONS.

1. It is a natural presumption, and therefore adopted as a rule of law, that on the settlement of a new territory by a colony from another country, and where the colonists continue subject to the government of the mother country, they carry with them the general laws of that country, so far as those laws are applicable to the colonists in their new situation; which thus become the unwritten law of the colony until altered by common consent, or legislative enactment. *De Ruyter v. Trustees of St. Peter's Church*, 119
2. The legal presumption is that a child born subsequent to the marriage of its mother, although begotten before that time, is the child of the husband. And the admission by a third person that the child was begotten by him, and not by the subsequent husband of the mother, is not evidence to rebut such legal presumption; in a suit to annul the marriage upon the ground that the consent of the husband to the marriage contract was obtained by fraud. *Montgomery v. Montgomery*, 132

### PRIVILEGED COMMUNICATIONS.

1. The true principle, in reference to privileged communications between attorney and client, is that where the attorney is professionally employed, any communication made to him, by his client, with reference to the object or the subject of such employment, is under the seal of professional confidence, and is entitled to protection as

a privileged communication. *Bank of Utica v. Mersereau*, 528

2. This seal of professional confidence is not the seal of the attorney, but of his client, which the attorney is by law as well as by professional honor bound to keep intact; and it cannot be removed except by the consent of the client. *ib*
3. The seal which the law once fixes upon such communications remains forever, unless removed by the party himself in whose favor it was there placed. *ib*
4. And where the privilege belongs to several clients, it seems that neither one of them, nor even a majority, contrary to the expressed will of the others, can waive the privilege, so as legally to justify the attorney in giving testimony in relation to such privileged communications; especially in a case where the testimony of the attorney equally affects the moral characters of all his clients, by showing that they employed him professionally to assist them in giving a fictitious judgment for the purpose of defrauding their creditors. *ib*
5. Nor will the fact that the client, whose assent to the removal of the seal of professional confidence from privileged communications has not been obtained, is not a party to the suit in which his attorney is called upon to testify, alter the case. *ib*
6. Neither will the fact that an attorney was a subscribing witness, to a warrant of attorney prepared by him for his clients to execute, alter the question as to the admissibility of his evidence tending to the conclusion that the object of giving the warrant of attorney, and having judgment entered thereon, was to hinder and delay their creditors in the collection of their debts; and that the judgment was given for a much larger sum than was justly due to the judgment creditor. *ib*
7. But an attorney who is professionally employed to prepare a deed for his client, and who afterwards witnesses its execution, may be compelled not only to prove the execution of such deed, but also to testify whether it was ante-dated; whether it was in the same form in which it now ap

years, at the time of its execution, or has been altered; and whether it was actually delivered at the time he subscribed his name thereto as a witness.

*ib*

8. And if the deed has been lost, or is in the hands of the adverse party, who refuses to produce it upon the trial, or for the purposes of the suit, the attorney who witnessed the deed may be compelled to testify as to the contents thereof; although in the preparation of such deed he was professionally employed.

*ib*

9. *It seems* the seal of professional confidence has never been held to cover a communication made to an attorney to obtain professional advice or assistance as to the commission of a felony, or other crime which is *malum in se*.

*ib*

10. But the fact that an attorney was employed by his clients to assist them in a transaction which, from what was said in his presence, he must have known to be a fraud upon their creditors, will not deprive their communications of the seal of professional confidence.

*ib*

11. The privileged relation of attorney and client, however, ought only to be permitted to exist for honest purposes, and not to enable the client to perpetrate a fraud, or to violate the laws under the advice of counsel, or through any other professional aid. But the law appears to be settled otherwise.

*it*

## R

### RECEIVER.

*See* INSOLVENT CORPORATIONS.

### REHEARING.

*See* PRACTICE, 6.

### REINSURANCE.

*See* INSOLVENT CORPORATIONS.  
INSURANCE.

## RELEASE.

*See* MORTGAGE, 12, 13.  
WITNESS.

## RELIGIOUS SOCIETIES.

*See* CORPORATION.

## RENT.

*See* LEASE.

## S

### SEPARATION.

*See* HUSBAND AND WIFE, 15, 16, 17.

### SET-OFF.

1. B. bought four lots of land, and gave back mortgages thereon, to the vendor, for the purchase money. B. afterwards sold and conveyed two of the lots to C., subject to the payment of one half of the mortgages, which C. agreed to pay, as part of the purchase money. The latter then conveyed the same lots to R., subject to the payment of the same amount; which R. in the same manner agreed to pay, as a part of the consideration of his purchase. After R.'s death the mortgages were foreclosed, the lots were sold, and the proceeds of the sale being insufficient to pay the demands, there were decrees over against B., the mortgagor, for the deficiency; which he was compelled to pay to the mortgagee. He then called on C. for the payment of his share of such deficiency, and received from him his bond and mortgage as security therefor. On a bill, by the administratrix of R., to foreclose a mortgage given by C. to R.; *Held*, that the amount of the deficiency, was a demand existing against R. in his lifetime, which C. might set off against the amount secured by the mortgage to R. which the executors sought to foreclose. *Rawson v. Copland*, 166

2. To entitle a defendant to an offset, against an executor or administrator,

it is not necessary that the defendant's debt should have been actually due, or really liquidated, at the death of the testator or intestate. But it is sufficient if it has become due and payable at the time the suit is brought against him by the executor or administrator; so that if the decedent had lived, and had brought a suit against the defendant, at that time, the demand of the latter would have been a proper subject of offset. *ib*

### SOLICITOR.

*It seems* that if a person not legally authorized to practice law is employed to conduct judicial proceedings, he is not legally responsible to his employer for any loss the latter may sustain in consequence of the ignorance of the person so employed, in respect to legal proceedings. *Wakeman v. Hazleton*, 148

### SPES RECUPERANDI.

*See* DEVISEES.

### STATUTE.

The fair construction of the act of April 14, 1838, amending the act to incorporate the Globe Fire Insurance Company, by which the directors named in the original act, were continued in office until the 2d Tuesday of May, 1839, and were authorized to open the books of subscription again, and to receive subscriptions for the purpose of filling up the capital stock of the company, is that it extended the time for the organization of the company, and for the commencement of its business, one year; although that act does not in terms extend the time for the commencement of the business of the company. *Johnson v. Bush*, 207

*See* HUSBAND AND WIFE, 14.

### STOCK.

*See* CORPORATION, 5 6, 7, 8, 9, 10.  
HUSBAND AND WIFE, 6.

### SUPPLEMENTAL BILL.

*See* BANKRUPT AND BANKRUPT LAW, 5

### SURROGATE.

*See* WILL, 4, 6.

### SURVIVORSHIP.

*See* HUSBAND AND WIFE, 9.

## T

### TAX SALES.

1. The effect of the several statutory provisions relative to the sale of land for taxes, is that if the land sold by the comptroller, or any part thereof, is actually occupied at the end of the two years from the close of the sales, the purchaser, or his assignee, must serve the notice required by the act of April, 1830, upon the occupant, and file the evidence of such service with the comptroller, within the times prescribed by that act, or by the act of 1844 amending the same; or he will lose the benefit of his purchase. *The Bank of Utica v. Mercereau*, 523
2. Where the purchaser serves such notice and files the evidence of such service within the time prescribed, and the lands are not redeemed within the six months allowed by the act of 1830 for that purpose, his title will become perfect as soon thereafter as he shall have obtained the comptroller's deed; whether such deed shall have been given before, or after, the service of such notice. *ib*
3. In cases, however, where the lands sold are not occupied at the expiration of the two years, but there is an actual occupant of the land, or of any part of it, at the time of the giving of the comptroller's deed, the title of the purchaser will not become absolute, under such deed, until six months after he shall have served the occupant with the notice to redeem; and shall have obtained the comptroller's certificate that evidence of the fact of such service has been filed, and that the land was not redeemed by the payment of the redemption money



into the treasury within six months after the service of such notice. *ib*

4. But in cases not coming within the scope of the act of April, 1830, there is no time limited by law for giving notice to the occupant of the land who was in the occupancy thereof at the time of giving the comptroller's deed. And the only effect of a neglect to give such notice is to extend the time for redemption of the land, and the perfecting of the title of the purchaser. *ib*

5. The fact that the occupant of the land sold is the tenant of the grantee in the comptroller's deed, will not authorize the latter to perfect his title, as against the paramount claims of others upon the land, without giving the notice to the occupant required by the statute. *ib*

6. If any part of the premises sold for taxes is actually occupied at the times specified in the statutes relative to the giving of notices to the occupant, the purchaser must give the prescribed notice to the occupant of such part of the premises, and obtain the comptroller's certificate that such notice was given and that the premises were not redeemed within the time prescribed; before he can complete his title to any part of the premises included in the purchase. *ib*

7. If the lands described in the comptroller's deed cannot be located, for want of a proper description of the tract out of which the lands sold were to be taken, the sale is invalid. *ib*

See COMPTROLLER'S DEED.

## TRUSTS AND TRUSTEES.

1. Trusts for accumulation, being prohibited by statute, except for the benefit of minors, a trust to accumulate the rents and profits of real estate, or the interest or income of personal estate, cannot be created for the benefit of a lunatic who is not a minor. But where an annuity is given absolutely to a lunatic, a court of equity may direct the surplus, beyond what is necessary for his support, to be paid over to his committee, and invested for his use. *Craig v. Craig*, 76

2. Where the income of a lunatic is more than can be properly expended for his use, it must, as a matter of necessity, be accumulated for him, or for those who may eventually be entitled to his property, as his next of kin. But that is not a trust for accumulation which is prohibited by the statute. *ib*

3. Where there is a limitation over, not only of the capital of a fund directed to be invested for the purpose of paying an annuity for life, but of so much of the proceeds thereof as shall remain at the decease of the annuitant, there is an implied direction to accumulate the surplus income of the capital by the executors, in trust for adults, or for persons not *in esse* at the time the accumulation is directed to commence; which direction to accumulate is void by the provisions of the revised statutes. *ib*

4. Where trustees under a will have accepted the trust and have received a legacy given upon the condition that they should execute such trust, the court will not discharge them from the trust without good and sufficient cause be shown. *ib*

5. Where a portion of the trusts of a will can be so far severed from the general trust committed to the executors, as to be capable of being vested in different persons, the court, upon sufficient cause shown, and on the giving of proper security to protect the rights of the *cestuis que trust*, may accept the resignation of the trustees appointed by the will, as to those particular trusts, and appoint others in their places. *ib*

6. A residuary devise of real or personal estate, carries with it not only the property of the testator in which no interest is devised or bequeathed by other parts of the will, but also all reversionary and contingent interests in the property which, in events contemplated by the testator, are not otherwise disposed of. *ib*

7. To a bill filed by a *cestui que trust* against the trustees and the other *cestuis que trust*, for the purpose of obtaining a conveyance of the complainant's share of the legal title to real estate, alleged to be in the trustees, and for a partition of the premises, two of the defendants pleaded that neither the complainant nor the

trustees in whom the legal title was vested, were, nor was either of them, in possession of the premises at the time of the commencement of the suit; without denying the allegation in the bill that the trustees held the legal title as trustees for the complainant and the other *cestuis que trust* in different undivided proportions; *Held* that the complainant was entitled to a decree establishing the alleged trust, and directing the conveyance of the complainant's share of the legal estate to him whenever the trustees could legally make such conveyance; notwithstanding the whole premises were, at the time, held adversely to both parties. *Bradstreet v. Schuyler*, 608

See USES.

## U

### USES.

1. The owner of a lot of land, in April, 1790, in consideration of £100, granted, bargained, and sold the same unto Y., V., and six other persons named therein, and to their heirs and assigns forever; to have and to hold the same to the grantees and their heirs and assigns forever, upon *trust*, for the benefit of D., V., and eleven other persons named in the indenture, members of St. George's Lodge of Freemasons, and all others who then were or thereafter might become, members of such lodge, their survivors and successors forever, and for no other use, intent, or purpose whatsoever. All the parties of the second part named in this deed, except Y., and the whole of the thirteen persons specifically named therein as a part of the then members of the lodge, having died, and the lot having been taken by a rail-road company, for the use of their road, the damages were assessed, and the amount paid over to Y. as the surviving grantee in the deed. Upon a bill filed by the heirs of the grantor in the deed, against Y., to recover from him the moneys thus received, for the lot, from the rail-road company; *Held* that it was not the intention of the parties to the deed to vest either the whole legal title, or the whole beneficial interest in the premises, in the thirteen persons therein specifically named, as members of the lodge, during the terms of their respective lives, for their benefit and the benefit of the survivor of them exclusively. But that it was the intention of the parties that it should operate as a conveyance of the legal title of the whole fee of the lot, not for the benefit of the thirteen individuals named, for life, with a resulting use to the grantor, but for the aggregate body of the members who then constituted, or who should thereafter constitute, the St. George's Lodge. *Vandervolgen v. Yates*, 243
2. *Held also* that the members of the lodge could not, as a lodge or society of freemasons, take the legal estate in the premises, as an executed use, under the statute of uses; but that they could take a beneficial interest in the property, as a charitable use. *ib*
3. *Held further*, that the statute of uses, instead of vesting the legal estate in the thirteen persons named in the deed, for life, with remainder to the grantor as a resulting use, vested the whole legal estate in Y., V. and the six other grantees, and in the survivor of them, as trustees; in trust for the use and benefit of those who were, or who might thereafter become, members of the lodge, as a charitable use; that the legal title was in Y., the surviving trustee, at the time the damages were paid over to him; and that the complainants were not entitled to such damages. *ib*
4. It was not the intention of the framers of the statute of uses to defeat and destroy the beneficial interest of the *cestui que use*; but only to change his mere equitable interest in the use of the property into a legal estate, in the property itself, of the same quality and duration. *ib*
5. Accordingly, where the beneficial use cannot take effect as a legal estate, in the *cestui que use*, it will take effect as a trust, in the same manner as if the statute had not been passed; where it can take effect as a trust, consistently with the rules of law. *ib*

### USURY.

- A subsequent mortgage is not a borrower within the meaning of the usury laws, so as to authorize him to file a bill to set aside a previous security, given by the mortgagor, on the ground

that it is usurious, without paying or offering to pay the amount actually due or advanced, for which such previous security was given. *Rexford v. Widger*, 640

V

VENDOR AND PURCHASER.

See AUCTION.

EXECUTION, 4, 5, 6, 7, 8  
JURISDICTION, 4.

VERDICT.

See ALIMONY.

W

WARRANTY.

See AUCTION.  
ESTOPPEL.

WILL.

1. *Execution of.*

1. Where one of the subscribing witnesses to a will swears that all the formalities required by the statute were complied with, on the execution thereof, the will may be admitted to probate; notwithstanding the other subscribing witnesses may not be able to recollect the fact. *Nelson v. McGiffert*, 158
2. Where the attestation clause of a will states that the will was signed, sealed, and published by the testator, as his last will and testament, in the presence of the attesting witnesses; who, at his request, and in his presence, subscribed their names as witnesses thereto, this, after a considerable lapse of time, and when it may reasonably be supposed that the particular circumstances attending the execution of the will have escaped the recollection of the attesting witnesses, is a circumstance from which the court, or a jury, may infer that these requisites of the statute were complied with. *ib*

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3. In the execution of wills, the statute does not require any particular form of words to be used by the testator, either in the admission of his signature, in the publication of the instrument as his will, or in the communication to the witnesses of his request or desire that they should subscribe their names to the will as attesting witnesses to the fact of its due execution by him. It is sufficient if the formalities required by the statute are complied with in substance. *ib*

2. *Proving; and effect of probate.*

4. Upon the proving of a will, before the surrogate, he has jurisdiction and power to receive proof that such will was revoked by a subsequent will of the testator; and that such subsequent will has been fraudulently destroyed, or that it was destroyed by the testator when his mind had become so far impaired that he was incompetent to perform a testamentary act. *ib*
5. But the chancellor alone has the power to take proof of the will which was thus destroyed, for the purpose of establishing it as a testamentary disposition of the property of the decedent. *ib*
6. In resisting the probate of an instrument propounded as the last will and testament of a decedent, his heirs and next of kin have the right to introduce any testimony which will be sufficient to satisfy the surrogate that the instrument propounded was not in force, as a valid will, at the death of the testator named therein. *ib*
7. The probate of a will of personal property, whether such probate was obtained by a summary or a plenary proceeding, if granted by the proper testamentary court, is conclusive evidence of the due execution of such will; until such probate has been called in, or annulled, by such court; or has been reversed on appeal to the proper tribunal. *Muir v. Trustees of the Leake and Watts Orphan House*, 477
3. *Revocation of.*
8. A subsequent will does not revoke a former one, unless it contains a clause of revocation, or is inconsistent with it. And where it is inconsistent with

the former will, in some of its provisions merely, it is only a revocation *pro tanto*. *Nelson v. McGiffert*, 158

9. Where a subsequent will has been made, and there is no evidence that it contained any clause revoking a former will, as in cases where the contents of the last will cannot be ascertained, it is not a revocation of the former will. *ib*

#### 4. Construction of.

10. Where a testator, desiring to make a certain provision for his son, which would give him a sure and ample support during his life, by his will directed his executors to invest in bonds and mortgages, and in New-York state stocks, a sum of money sufficient to produce, *in legal interest*, at least \$500 per annum, to be held by such executors in trust for the legatee, and such income to be used by them, in his support and maintenance; such investment to be made, as near as conveniently might be, in equal sums, in bonds and mortgages, and in New-York state stocks; *Held* that the investment should be so made, by the executors, as to raise the full sum of \$500 annually; that the testator did not intend that his executors should invest a capital which, at seven per cent interest, would produce \$500 annually, but an amount sufficient to produce at least \$500, in legal interest or income, at the rates at which such capital could be kept invested during the probable continuance of the life of his son; and that in making the investments upon bonds and mortgages the executors were authorized to invest such a sum as would, at six per cent, produce \$250 annually. *Craig v. Craig*, 76
11. *Held also*, that as to the other half of the investment, directed to be made in public stocks of the state, the executors had no discretion, so long as there were any such stocks to be purchased at par, whatever might be the annual income therefrom; and that in making the first investment, the executors were authorized to purchase, above par, five per cent stock enough to produce an income of \$250, annually, if they could not get it at par. But that after having once made such investment in stocks, the executors would not be authorized to diminish the capital of the fund invested, by purchasing other stock at a rate beyond its par value, in case the first stock should be paid off. *ib*
12. Where there is a devise of the income and avails of property to a person, for life, without any devise or bequest to the executors as trustees of such property, the legatee will take a legal estate in such property, if there is nothing else in the will to show that the testator intended to create a valid trust of the estate for his benefit. For a devise of the rents and profits of land for life, without any thing more, is but another mode of making a devise of the land itself, during the same period. *ib*
13. But where the will clearly shows that the testator intended a legatee should receive the rents and profits of the real estate embraced in one share of his property, as well as the income of the personal estate included therein, through the medium of his executors, the executors take the legal title to that share of the real estate during the continuance of the beneficial interest of the legatee therein, as trustees, by implication; to enable them to rent the premises, and to receive the rents and profits thereof, and pay them over to the legatee, or apply them to his use. *ib*
14. Where a testator, by the residuary clause of his will, gave, devised, and bequeathed to his wife, and to his child or children, all the rest and residue of his estate, share and share alike, and to the heirs of such child or children who might die leaving lawful issue; and in case either his wife or children should die without leaving lawful issue, then the share of such one dying to go and be divided amongst the survivor or survivors of them; *Held* that the limitation over to the survivors of the class was sufficient to show that an indefinite failure of issue was not intended by the testator, but a failure of issue at the death of the first taker; and that the limitation over to the surviving legatees was therefore valid. *Lovett v. Buloid*, 137
15. *Held also*, that the bequest to the widow, as well as to the children, was absolute in its terms, subject only to the contingency of the death of the legatee without leaving issue surviving. *ib*

16. And two of the testator's daughters having died leaving issue, and leaving their husbands surviving them, *Held further*, that they were entitled to an absolute estate and interest in their respective parts of the testator's residuary property; and that after their deaths, respectively, the same belonged to their husbands; under the provisions of the revised statutes relative to the distribution of intestates' estates. *ib*
17. Where a remainder, after the termination of a particular estate, is limited to certain specified individuals, or to the *survivors* of them, the court will refer the survivorship to the death of the testator, and not to the termination of the particular estate, where it is necessary to give effect to the probable intention of the testator in providing for the surviving issue of such of the objects of his bounty as may happen to die during the continuance of the particular estate. *ib*
18. But it seems this rule of construction will not be applied to a case where the particular estate is given to a class, with remainder to the survivors upon the death of some of the class without leaving issue. *ib*
19. Where the residuary estate of the testator is given to a class of persons, with remainder in the shares of such of them as die without issue, to the survivors, there is no benefit of survivorship, among the surviving members of the class, as to the share of the one of the class who has died without issue; but the surviving members of the class take their respective portions of that share absolutely. *ib*
20. A testator, by the fourth codicil to his will, revoked a certain part of the third codicil, and instead thereof he directed his executors to pay \$500 out of one share, or the fourth part of his estate, to the widow of his deceased son, and to pay over the remainder of that share to H., in trust, to invest the same and to pay over to his granddaughter S. the income thereof semi-annually until her eldest child should arrive at the age of twenty-one years; and at that period to divide the fund, as it might then exist, into as many shares as there might then be children of S., and to pay over to each child his or her share, upon their arriving at the age of twenty-one years, respectively. The testator's property consisted of personal estate en irely. On a bill by S. against her husband, and her children who were then living, and against the substituted trustee, claiming that the fourth codicil was void, so far as it limited the remainder in one of the shares to her children; *Held* that the fair construction of the fourth codicil was that the testator referred to the eldest child of S. at the time of making such codicil, as the child upon whose arrival at the age of twenty-one, S.'s estate in the income of that fourth of the testator's property should terminate; and not to the eldest of her children who should attain the age of twenty-one. *Butler v. Butler*, 304
21. *Held also*, that the fourth codicil should be construed as if the testator had directed the trustee to pay the income of the fund to S. until her oldest child, then in existence, or who might be in existence at the testator's death, should arrive at the age of twenty-one years; or until the time when such child would have arrived at the age of twenty-one years if it had lived to attain its majority. And in case such eldest child should live to attain its majority, then that such one-fourth of the estate should be divided into as many shares as there were children of S. then living, and that one share should belong to each child, and should be payable when they respectively arrived at the age of twenty-one; the income in the meantime to be accumulated for the benefit of such of them as were minors. *ib*
22. *Held further* that this contingent remainder to the children of S. was so limited that it must vest in interest, if ever, during the continuance of one life in being at the time of the death of the testator; which time, in a will, is to be deemed the time of the creation of the estate. *ib*
23. And the eldest child of S. who was in esse at the death of the testator, having lived to attain the age of twenty-one years, *Held* that the contingency contemplated by the testator then occurred; and that the children of S. who were then living thereupon became the absolute owners of the whole of the fund in controversy. *ib*
24. A testator, by his will, devised and bequeathed to his wife all the income of his real and personal estate for

life. And after her death he gave certain portions of his estate to the children of her brother. He then gave the residue of his estate, after the death of his wife, to A. E. T. during her life, subject to certain charges. By the fourth clause of his will he gave to the children or issue of A. E. T. \$10,000, after her death, and to the children of W. P. T. and A. J. S. \$20,000; one half to the children of each. By the fifth clause he gave to W. P. T., A. J. S., and E. S., as the same was possessed by his wife and A. E. T., if they outlived the latter, for life. By the sixth clause the testator gave the residue of his estate, real and personal, to E. S., to her and her children forever, to them and their heirs. And he left her, when she arrived at age, \$50,000, *any thing in his will contained to the contrary notwithstanding*. By the ninth clause the testator provided that in case E. S. should die without leaving issue, in that case, and no other, the whole of his estate that might then remain should go to his paternal and maternal cousins, &c. On a bill by a part of the paternal heirs and next of kin of the testator, for the purpose of obtaining their shares of his estate, upon the ground that the several dispositions of the property made by his will, except the life estate therein to his wife, were invalid; and to have the \$50,000 legacy to E. S. declared void; *Held* that the absolute ownership of the \$50,000 of the testator's personal estate was not suspended for more than two lives in being at the death of the testator, by the contingent legacy to E. S. and her issue; and that her right must vest in interest and in possession, if ever, during the continuance of one life in being at the death of the testator. That although the first and third clauses of the will gave successive life estates in the income of the real and personal property generally, to the widow and to A. E. T., yet that those general devises and bequests must be taken in connection with other provisions of the will; and must be construed, if possible, so as to be consistent therewith. *Jansen v. Cairnes*, 350

25. *Held also*, that the legal effect of the will, so far as related to the interests of the widow and A. E. T. and E. S., in the amount of the \$50,000 legacy, was the same as if the testator had ordered \$50,000 of his personal estate to be set apart and invested, so as to produce an income, and that the cap-

ital of the fund should be paid to E. S. when she arrived at twenty-one, if she lived to attain that age; and had limited successive estates in the income of the \$50,000 for the lives of the widow and A. E. T. respectively, unless the contingency sooner happened by which the capital became payable to E. S. 12

25. *Held further*, that upon the arrival of E. S. at the age of twenty-one, she would be entitled to the payment of the capital of the \$50,000, as her absolute property. 13

27. Whether the life estate of A. E. T. in the income of the amount of the \$50,000 legacy, was not invalid; on the ground that it might suspend the absolute ownership of that part of the fund for a longer period than two lives in being at the death of the testator? *Quære*. 13

28. A testator who died leaving seven children, together with J. K. the daughter of a deceased son, and three children, of another deceased son, his only heirs at law, surviving him, by his will directed that all his estate, real and personal, should be divided among his heirs, or their legal representatives, and prescribed certain rules to be observed by the executors in making such division. By one of those rules it was provided that in case both parents should be dead, and if their children, or any of them, had attained the age of twenty-one years, or were married, then that the executors should make an equal partition of the share which would have fallen to such parents, among their children. By another of those rules the testator's granddaughter J. K. was to be considered as standing in the same situation, with regard to her own rights, and the rights of her issue, as the testator's daughters; and all the rules applying to them, their husbands and issue, were to be applied to her and her husband and issue. By a codicil to his will the testator gave unto each of his grandchildren living at the time of his decease, the sum of \$6000, to be paid to them and each of them, upon their attaining, respectively, the age of twenty-one years, or marrying. At the time of the making of the will and codicil, J. K. was of the age of 21, and was married, and both her parents were dead. All the other grandchildren of the testator were under age and unmarried. At the date of

the codicil J. K. had one child, and was *enciente*, at the death of the testator, of a child born after his decease. She subsequently died, leaving four children surviving her. On a petition by C. K. the surviving husband, claiming that each of her two eldest children were to be considered as grandchildren of the testator, under the provisions of his will and codicil, so as to be entitled to legacies of \$6000 each, under the codicil: *Held* that the testator did not intend to give a legacy of \$6000 to J. K.; but that he meant to give a legacy of that amount to each of her children who should be in esse at the time of his death, by the designation of grandchildren. And that each of her children who were in esse at the testator's death, was therefore entitled to a legacy of \$6000, to be paid to them upon their marriage, or on attaining the age of twenty-one; in the same manner as the other grandchildren. *Hone v. Van Schaick*, 488

29. *Held also* that the child of which J. K. was *enciente*, at the death of the testator, must be considered as in esse, at that time, for the purpose of entitling such child to the legacy of \$6000, as one of the grandchildren of the testator who were then living. *ib*

##### 5. General rules of construction.

30. In the construction of wills, if the language of the testator is such that it may be construed in two different senses, one of which would render the disposition made of his property illegal and void, and the other would render it valid, the court should give that construction to his language which will make the disposition of his property effectual. *Butler v. Butler*, 304

31. How far the situation of the testator's family relatives may be taken into consideration for the purpose of giving a construction to the doubtful clauses in his will. *Cromer v. Pinckney*, 466

32. As a general rule in the construction of wills, the testator must be presumed to have used words in their ordinary or primary sense and meaning; unless from the context of the will it appears that he intended to use them in some other or secondary meaning; or where, by reference to extrinsic circumstances, which existed at the time of making the will, or which must necessarily

exist in the event or at the time contemplated by him, the use of such words in their ordinary or primary sense would render the provision of the will in reference to which such words were used insensible, absurd, or inoperative. *ib*

33. Thus the word children, in its primary and ordinary sense, means the immediate legitimate descendants of the person named. And where there is nothing to show that the testator intended to use it in a different sense, it will not be held to include illegitimate offspring, step-children, children by marriage only, grand-children, or more remote descendants. *ib*

34. The words nephews and nieces, likewise, in their primary and ordinary sense, mean the immediate descendants of the brothers and sisters of the person named, and do not include grand-nephews and grand-nieces, or more remote descendants. *ib*

35. But where the testator by one clause of his will gave a legacy unto each of his nephews and nieces except J. C. who was not a nephew but one of the children of a deceased nephew; and by another clause he gave to the children of his nephew J. C. \$500; *Held* that the brothers and sisters of J. C. and other grand-nephews and nieces whose ancestors were dead at the time of making the will, were entitled to legacies; the will showing that the testator used the words nephews and nieces in an enlarged sense, so as to include all the grand-nephews and nieces whose parents were dead. *ib*

36. *Held also*, that upon the ordinary rules of construction, parents and children could not both take, under the description of the testator's nephews and nieces, but only the parents who were living, and those grand-nephews and nieces whose parent was dead. *ib*

37. The word children, in its natural sense, only embraces the immediate descendants of the person named or described; and does not include descendants of a more remote degree. *Hone v. Van Schaick*, 488

38. Nor does the term grandchildren, without something further to extend its natural signification, include great-grandchildren. *ib*

39. A testator is to be presumed to have used words in their natural or primary sense; unless there is something in the situation of his family, or in his will, to lead to a contrary conclusion. *ib*
40. But it is a cardinal rule, in the construction of wills, that the intention of the testator is to govern, if consistent with the rules of law. And he is not bound to use any particular form of words to devise or bequeath a legal interest in property, or to designate the objects of his bounty; provided he uses language which is sufficient to show his intention. *ib*
41. The testator's intention is to be ascertained from the whole will taken together, and not from the language of any particular provision or clause thereof when taken by itself. *ib*
42. For the purpose of construction, a will and a codicil may be considered together, and construed as different parts of the same instrument. *ib*
43. An unborn child, after conception, if it is subsequently born alive, and so far advanced towards maturity as to be capable of living, is considered as in esse from the time of its conception; where it is for the benefit of the child that it should be so considered. *ib*
- See ANNUITY.  
DECLARATIONS.  
EXECUTORS AND ADMINISTRATORS,  
1, 2, 6, 7.

## WITNESS.

1. A release of the personal liability of one of several defendants, on a judgment in favor of the releasor, executed in pursuance of the provisions of the act of April, 1838, for the relief of partners and joint debtors, but which release leaves the judgment, and the debt for which it was recovered, in full force against the other defendants, will not render the defendant thus released a competent witness for the plaintiff in such judgment. *The Bank of Utica v. Mersereau*, 524
2. To restore the competency of such witness, if he is incompetent in consequence of any contingent liability, for the judgment debt, depending upon the event of the suit in which he is called as a witness, the plaintiff should not only release him but also the other judgment debtors from such contingent liability. *ic*
3. Where it only appears from the examination of the witness himself that he is interested in favor of the party calling him, or that he is otherwise incompetent, the objection to his competency may be removed in the same manner that it was created. And the witness may be examined by the party calling him, to show that his interest has been removed by a release, or to prove any other fact to establish his competency at the time of his examination. *ib*
4. But where the witness' interest, or other incompetency, appears *aliunde*, the witness cannot be examined for the purpose of showing his competency; by testifying to the execution of a release, or to any other fact. *ib*
5. Where a release of the interest of a witness, produced at the hearing, is neither dated nor witnessed, the acknowledgment by the party executing it is only evidence that he had executed it at or before such acknowledgment; not that it was executed previous to the examination of the witness, where such examination was before the date of such acknowledgment. *ib*
6. In the court of chancery, where many issues frequently are combined in one suit, a witness is not to be rejected altogether because he is interested as to one part of the case, when as to another part of the case he has no interest whatever. He may be examined as a witness to that part of the case in which he has no interest; or in which his interest is adverse to the party calling him. *ib*

















